No 133

Office - Supreme Court, U. S.
FILED
JUN 16 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945.

No. 138

NICHOLAS J. CURTIS, Petitioner,

vs.

UTAH FUEL COMPANY, a corporation, its officers and agents, specifically; DR. E. R. MURPHY; DR. ROBERT S. ALLISON (deceased); DR. FRANCIS S. BASCOM (deceased); H. COLLIN MINTON, JR., and FERDINAND ERICKSEN, its attorneys; NICHOLAS J. PAPPAS, Paterson, N. J.; HELEN N. PAPPAS, Paterson, N. J.; SORTIRIOS NICHOLAIDIS, Paterson, N. J. (not served); HARRY SUSSMAN, Paterson, N. J.; WILLIAM V. ROSENKRANS, Paterson, N. J.; LOUIS BROWNLOW, Washington, D. C. (not served); CHARLES W. KUTZ, Washington, D. C. (in default); DR. PERCY HINKLING, Washington, D .C. (deceased); WILLIAM H. FAY, Washington, D. C. (cannot be found); WILLIAM J. HAZEN (MELVIN J. HAYS), Washington, D. C. (cannot be found); WILLIAM H. FOLLAND, Salt Lake City, Utah (in default; no motion or other pleading); DR. LESLIE J. PAUL, Salt Lake City, Utah (no appearance; in default); DR. SAMUEL WOLF, Salt Lake City, Utah (deceased); SIMON BAMBERGER, Salt Lake City, Utah (deceased, BAMBERGER COAL CO. substituted); DR. FREDERICK DUNN, Springville, Utah (appear by Special Appearance, name only); DR. FRED W. TAYLOR, Provo, Utah (no appearance; in default); DR. A. C. CALLISTER, Salt Lake City, Utah (appearance by Special Appearance, name only); DR. D. E. SMITH, Salt Lake City, Utah (appearance by Special Appearance, name only); CAROL C. JOHNSON, New York (Motion to Vacate); JOSEPH RIRIE, Salt Lake City, Utah (deceased); D. O. LARSON, Salt Lake City, Utah (no appearance; in default); CHARLES E. MAYBE, Salt Lake City, Utah (no appearance, name only on Special Appearance list, no Motion or Affidavit); MARK TUTTLE, Salt Lake City, Utah (no appearance; in default); ADDISON P. ROSENKRANS, Paterson, N. J.; LOUIS ANTONOPOULOS and GEORGE LAVDAS, Trenton, N. J.; CHARLTON OGBORN and CAROL C. JOHNSON, New York City, N. Y.; GROVER A. GILES, Salt Lake City, Utah, and ZAR E. HAYES, Salt Lake City, Utah. Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS THIRD CIRCUIT, PHILADELPHIA, PENNA.

NICHOLAS J. CURTIS, LL.B., Petitioner,
Appearing in Person,
145 N. Broad St., Trenton, New Jersey.

GROVER A. GILES,
Attorney General of the State of Utah.

ZAR E. HAYES,
Assistant Attorney General of the State of Utah.

Associated with:
H. COLLIN MINTON, JR. and
H. BRUA CAMPBELL,
As Attorneys for Appellees, Dr. Frederick Dunn, Dr. A. C. Callister, Dr. E. D. Smith, Charles E. Mabey and William D. Sutton.

WILLIAM V. ROSENKRANS,
ROSENKRANS & ROSENKRANS,
Attorneys for Rosenkrans, et als.,
5 Colt Street, Paterson, New Jersey.

CAROL C. JOHNSON,
68 Williams St., New York City, N. Y.
Defendant.

ERRATA IN THE PETITION AND BRIEF. FOR THE OMISSIONS PLEASE USE THE PRINTED INDEX.

1. On page 2, last 4th line should read: page 348;

2. The second omission on last 3rd line should read: pages 348-349;

3. And the last omission on same page should read: pages 350-351.

4. On page 24, last paragraph, on line 2, reads: I am now moving to dismiss the courts (etc.). Should read: I am now moving to dismiss the Counts on which our motions were sustained.

5. On page 31 the 14th line is a double of the 15th.

6. On page 54, paragraph 5th, the T. should be S. as it reads on the top of the page.

7. On page 59, 2d paragraph, 4th line the omission should read: 133-147.

8. On page 59, paragraph 3, omission found in second line should read: page 134. The Section of the State law is set forth the re.

9. On page 73, paragraph 8, on line 20, the omission is to be found on page 292.

10. On page 74, on the 6th line, the omission is pages 301-308.

11. The omission of page 99, paragraph 2, 3rd line is pages307-308.

12. On page 125, paragraph 4. b. the Ch-- is Ch. Fa.

13. On page 130 Brief, paragraph 10, last line, should read:Ch.E.F.

14. On page 142, in the closing paragraph of the brief on line 7 "motions numbered 1/, 2, and 3) should read: motions numbered 1, 2, and 3.

NOTE---Good printers usually return their job for second reading before they close the job, but these here returned three bills almost in the sum of $800.00 and at the same time obliged me to take my papers direct from them to the Clerk of this Court with out seeing them; and even if I have had seen the mistakes there was no way left open to correct them.

NICHOLAS J. CURTIS PETITIONER.

STATEMENT OF CONTENTS.

1. The Questions which are presented are set out on pages numbered 6-16 beginning on the last part of page 6.

2. Ch. A. B. C. begins at page seventeen (17) and ends at page 19.

3. Ch. D. begins at page 20 and ends at page 33, and on page 22 there is set out the Opinion of the Circuit Court of Appeals Third Circuit on Appeal No. 8027.

4. Ch. E. F. begins at the last part of page 33 and ends at the top of page 40.

5. Ch. G. H. begins at page 40 and ends at first part of page 44.

6. Ch. I. begins at page 44 and ends at page 47.

7. Ch. J. K. L. M. begins at page 47 and ends at page 53.

8. Ch. N. O. begins at last part of page 53 and ends at the end of the same page. The Argument to Ch. N. O. is set out in the Appendix. It begins at page 142 and ends at the first part of page 162.

9. Ch. P. Q. R. S. begins at page 54 and ends at the top of page 58.

10. Ch. T. begins at page 58 and ends at the top of page 61.

11. Ch. U. Ua. begins at page 61 and ends at page 70.

12. Ch. V. W. begins at page 70 and ends at page 79.

13. Ch. X. begins at page 80 and ends at first part of page 82.

14. Ch. Z. Y. begins at page 82 and ends at page 85.

15. Ch. Za. Zb. begins at page 85 and ends at page 86 with reference to Argument of Ch. N. O.

16. Ch. A. begins at page 86 and ends at page 90.

17. Ch. Ba. Bb. Bc. Bd. begins at page 90 and ends at page 94.

18. Ch. Ca. Da. begins at page 94 and ends at first part of page 95.

19. Ch. Ea. begins at page 95 and ends at first part of page 106.

20. Ch. Fa. begins at 2d part of 106 and ends at page 114; and at page 108 there is again set forth the Opinion of the Circuit Court of Appeals Third Circuit on Appeal No. 8027; and at the last part of page 95 and on to the first part of page 99 there is set out in full the text of the first Motion (Demurrer) filed in Civil No. 728 on behalf of the therein named defendants. Demurrer (Motion) duly considered by Judge Thomas Glynn Walker, D. J.; U. S. D. Ct. Dist. N. J.

21. The Petition for Writ of Certiorari ends at page 115.

22. Petitioner's Certificate is set forth on pages 115-116; and is followed by his verification which is set forth on pages 116-117.

23. The Petitioner's Notices to the Respondents is set out on page 118.

24. The Petitioner's Brief begins at page 119 and ends at page 142.

25. The Questions Presented are set out on pages 119-123.

26. The Argument to Ch. N. O. begins at page 142 and ends at page 162.

27. At the end of page 162 the Commercial Union of America, Inc. v. Agle South American Bank, Ltd., 10 F. 2d 937 begins and ends at page 172.

28. At the last part of page 172 begins the case of Hyde and Schnieder v. United States and ends at first part of page 187.

At the 2d part of page 187 begins the case of Brown v. Elliot and ends at page 190. The Case of United States v. Kissel is quoted in the case of Hyde and Schnieder.

29. At the last part of page 190 begin the section of the Laws of the United States which are set out in full and end at page 196.

30. The bodies or texts of the three (3) motions upon which Judge Guy L. Fake based his Opinion are set out in full in pages numbered 82-85.

NICHOLAS J. CURTIS, LL. B.,
Petitioner.

TABLE OF CASES IN THE PETITION, BRIEF AND APPENDIX.

UNITED STATES CODE ANNOTATED.

PAGE

REVISED STATUTES OF UTAH.

CONSTITUTION OF UTAH.

PAGE

Amendments IV, V, VI, VIII, XIV.
Art. 1, Sec. 8, Par. 18, p. 36.
Amdt. 14, p. 74; Amdt. of 1884, Sec. 6, p. 143.

Cyclopedia of Federal Procedure, Secs. 32, 55, p. 55.

Sections 32, 70, p. 56; Section 685, pp. 293, 146.

Stroud's Judicial Dictionary, 2d Ed., Vol. 3, p. 1726
"Repugnant", p. 111.

Bigelow Lead. Cas. on Torts 207..... 187

Story Eq. Jur., sec. 525.

Honolds Supreme Court Law 1567

IN THE

SUPREME COURT OF THE UNITED STATES.

WASHINGTON, D. C.

October Term, 1945.

No. .....

NICHOLAS J. CURTIS,

Petitioner,

vs.

UTAH FUEL COMPANY, a corporation, et als.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS THIRD CIRCUIT; APPENDIX AND SMALL BRIEF IN SUPPORT OF THE PETITION.

(Curtis v. Utah Fuel Company, Civil No. 728, Walker, D. J. D. C. N. J., 2 Fed. R. D. 570, 571, 572; Curtis v. Utah Fuel Company, C.C.A. N. J., 132 F. 2d 321; Curtis v. Utah

Fuel Company, N. J. 63 S. Ct. 993, 318 U. S. 789, 87 L. Ed. 1156 den'g cert. 132 F. 2d 321, Aff'g 2 F. R. D. 570; Ex parte: In the matter of Nicholas J. Curtis, Petitioner, (No. .... Original). Motion for leave to file petition for Mandate. March 9, 1925. Denied. 2 45 S. Ct. 353, 267 U. S. 582, 69 L. Ed. 798. Mem. The Opinions, Judgments and Decree involved in the present proceeding are not listed above.)

NICHOLAS J. CURTIS, LL.B.,
Petitioner Appearing pro se,
No. 145 N. Broad Street,
Trenton 8, New Jersey.

TO THE HONORABLE HARLAN FISKE STONE, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATED JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of Nicholas J. Curtis, LL.B., respectfully prays for a Writ of Certiorari to the Circuit Court of Appeals within and for the Third Circuit to review the second Opinion of said court rendered the 5th day of March, A. D. 1945, and Order made and entered thereon on the same date, and its Final Judgment entered on the twentieth day of March, 1945.

The Opinion sought to be reviewed is (Nicholas J. Curtis v. Utah Fuel Company, et als.) in the Record herein page ..... The Order made and entered thereon is in the Record herein page ..... And the Final Judgment (Mandate) on said Opinion and Order sought to be reviewed is Curtis v. Utah Fuel Co. in the Record herein pages .....

The Mandate of the Circuit Court of Appeals finally settled whatever was before the Court. Honold Supreme Court Law, page 1567.

Sibbald v. United States Peters 12, U. S. Book 9; Ex parte Union Steam Boat Co., 178 U. S. 317, 20 S. C. 904, 44 L. Ed. 1084; Perkins v. Furnigue, 14 How. 328, 220, 14 L. Ed. 441, 442; Milwaukee & M. R. Co. v. Southern, 2 Wal. 40, 443, 17 L. Ed. 860, 861; Boyce v. Grundy, 9 Pet. 275, 9 L. Ed. 127; Ex Dubugue & P. R. Co. v. Litchfeld, 1 Wall. 69, 17 L. Ed. 514; Durant v. Essex Co., 101 U. S. 555, 25 L. Ed. 961; City Bank v. Hunter, 152 U. S. 512, 14 S. Ct. 675, 38 L. Ed. 246, 14 S. Ct. 804; Re Sanford Fork & Tool Co., 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414; Re Potts (Re C. & A. Potts & Co.), 166 U. S. 263, 17 S. Ct. 520, 41 L. Ed. 994.

This Court has jurisdiction to review said decision under section 240 of the Judicial Code (28 U.S.C.A. Sec. 347): To-wit:

UNITED STATES CODE 1941. Title 28—Judicial Code and Judiciary Sec. 347. (Judicial Code, Section 240 (a)).

In any case, civil or criminal, in a Circuit Court of Appeals, . . . it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto; whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal. Gray v. Powell, 314 U. S. 406, 86 L. Ed. 307, 62 S. C. 330; Ex Parte Richard Quirin, 317 U. S. 18, 87 L. Ed. 7, 63 S. Ct. 3; Exker v. Western Pacific R. Corp., 318 U. S. 489, 87 L. Ed. 940, 63 S. Ct. 694; United States v. Bankers Trust Co., 294 U. S. 240, 294, 295, 79 L. Ed. 885.

In any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court. Rose's Code of Federal Procedure, Vol. 1, Section 14. Citing: Part of Sec. 6 Act Mar. 3, 1891, Chap. 517, 26 Stat. 826, U. S. Comp. Stat. 1901; And Sec. 129, set forth on page 2 of the Appendix to the Rules of this Court, to-wit: Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, . . . an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 239 and 240 shall apply to such cases in the circuit courts of appeals as to other cases therein: Provided, That the appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, . . . The appeal to the circuit court of appeals was applied for within thirty days from the entry of the Opinion and Orders made and entered thereon (pages 307-308; 326-327 Record).

UNITED STATES CONSTITUTION and

The Statutes involved are:

Jurisdiction founded on the existence of several Federal Questions and amount in controversy; Also under the Civil Rights Act and Sections enumerated hereafter of Title 15 U.S.C.A. The Articles of the United States Constitution involved are: Article I, Section 9, Subd. 2; Art. III, Section 2; The Amendments to the Constitution of the United States, Amendments IV, V, VI, VIII and XIV; U.S. C.A. Title 8, Ch. 3, Sections 41, 43, 47 (2), (3); Title 15, U.S.C.A. Sections 1, 2, 3, 4, 5, 15, 24, 26; Title 28, U.S.C.A. Sections 103, 725, and 729; Section 41 (1) (8), (12), (14),

(17), (23) of Title 28 U.S.C.A. See page 3 of Complaint. Also Under the Constitution and Statutes of the State of Utah. The Constitution of the State of Utah. Article 1, Section 1; Article 1, Section 5; Article 1, Section 8c.; Article 1, Section 9; Article 1, Section 11e; Article 1, sec. 12 (page 91 of Complaint). Set out in full; Article 1, Section 14; Article 1, Section 26; Revised Statutes of Utah. Conspiracy. Ch. 11. (1), (2), (3), (4), (5); (page 92 of Complaint). Set out in full. Revised Statute of Utah: title 49. 49-6-1. Vice Principal Defined; Title 103. 103-1-3. Penal Code. Chapter 1. (1), (2), (3), (4), (5) (pages 90-91); Title 42. Industrial Commission. R. S. Of Ut. 1933. See pages: 44-45, 46, 47, 48, 49 and on to page 90, of the Complaint; * * * * 42-1-38. Id. Each Day's Default a Separate Offense. * * * * Every day during which any person fails .... to perform any duty imposed by this title shall constitute a separate and distinct offense. (C. L. 17, Sec. 3093.) * * * * 42-1-57. RIGHT TO COMPENSATION—Exclusive Remedy. Exception. * * * * (pages 48-49 of Complaint.... ; provided that where the injury is caused by the employer's willful misconduct and the act causing such injury is the personal act of the employer himself, or, if the employer is a .... corporation, of an elective officer or officers thereof, and such act indicates a willful disregard of the life, limb or bodily safety of employees, such injured employee (* * * *) or other person damaged (* * * *) may, at his option, either claim compensation under this title or maintain an action at law for damages (page 49 Declaration).

"This is an action on the case setting forth a malicious conspiracy or confederation with the means employed to effect its purpose and the resulting damages to the plaintiff in the district court and petitioner here. The basis of the action are as stated in the Declaration the fraudulent and malicious acts of the defendants in ruining the plaintiff

in the court below and petitioner here; and in driving him out from State to State aiming to force him to deportation out of the United States; the proceedings and statements of the means used to effect this purpose all combine to produce a single cause of action. Van Horn v. Van Horn, 24 Vroom 514 (New Jersey; Kamm, Inc. vs. Flint, et als., 175 Atl. 62.

The determination of this cause depends upon the principles of law governing conspiracy and that in view of the conflicting decisions of the lower courts and the numerous cases under the conspiracy statutes of the United States, the cause is of vital importance as to the petitioner herein as well as the United States (pages ..... Record) and its citizens thereof, and that the principles upon which the cause depends be definitely settled by this court.

It will be observed that the Declaration charges that the conspiracy was formed in the State of Utah and that certain of the overt acts were performed there and others in the District of Columbia; and others in the state of Utah; and others in the States of New Jersey and New York. The conspiracy has now flared-up every where (see pages ..... Record).

A part of the Statutes involved are set out in the Appendix herein in full at pages 190-196 of this Petition.

THE QUESTIONS WHICH ARE PRESENTED FOR THE SUPREME COURT'S CONSIDERATION ARE THE FOLLOWING:

A.

The first question, therefore, is presented as to the venue in conspiracy cases, brought under the authority of Ch. 3

of Title 8 U.S.C.A. Sections 41, 43, and 47; and Title 15, Sections 15 and 26 U.S.C.A.; whether it must be in the State of Utah where the conspiracy was entered into or whether it should be in the State of New Jersey wherein numerous overt acts have been and continuously are committed.

B.

Whether the plaintiff in the district court and petitioner here erred in complying with the provisions of the Opinion of the United States District Court District of Utah adjudging and directing the petitioner herein to sue the Utah Fuel Company in the District Court of the United States for the District of New Jersey on the ground and for the reason that he was, and is, an alien, that is a citizen and subject of the Kingdom of Greece.

C.

Whether the plaintiff below and petitioner here neglected to bring his suit timely or whether he was and still is impeded and obstructed of and from doing so.

D.

Whether the Statute of Limitations of the State of Utah applies to and govern the conspiracy set forth in the twenty-five Counts of the Declaration or the cause is governed by the rule of law enunciated in United States v. Kissel, 218 U. S. 601; and applied in the case of Hyde and Schneider v. United States, 225 U. S. 347; and Brown v. Elliott..... (pages 72-187 Hyde cas.; 187-190 Brown cas. Appendix here)

E.

Whether the conspiracy set forth in the twenty-five Counts of the Declaration as supplemented by the Bill on the equity side of the Court No. 2800 and additional Affidavits thereto is governed by the inhibition of the law found in section 112 of Title 28 U.S.C.A. or it is governed by the authority of the cases just cited above Q. Pre-D.

F.

Whether the proceeding here bring up before this Court a cause coming on under the general jurisdictional rule of the district court or is a cause whose jurisdiction was predicated upon the inhibition of the laws found in chapter 3 of Title 8, Sections 41, 43, 47 (2), (3), and Sections 15 and 26 of Title 15 U.S.C.A.; and therefore within the inhibition of the law found in R. S. Sec. 722 (729 U.S.C.A. Title 28); and Section 103 of Title 28 U.S.C.A.

G.

Whether the defendants in the district court were accorded their statutory rights and privileges by giving to them every opportunity to present their defenses by appearing and presenting to the court the truth of their side of the cause.

H.

Whether the sum or value of the matter in controversy is material as to those parties co-defendants or, co-conspira-

tors, residents of the State of New Jersey and citizens of the United States.

I.

Whether the clause "against any one or more of the conspirators" in Sec. 47 (3) U.S.C.A. and Section 43 Tit. 8 means that that is a statutory privilege given to plaintiff to bring his suit against more than one of his joint wrong doers.

J.

Whether district judge Thomas Glynn Walker had not fully considered and deliberately decided motions numbered 1, 2, 3, and 4 (Rulings pp. 352-356 Record; 2 F. R. D. 570-571).

K.

Whether the said decision was not a controlling precedent in every other hearing before any other district judge of the same court sitting in the same case; and whether Rulings on Motion No. 4 were not of equal effect as those on motions Nos. 1, 2, and 3. And

L.

Whether the said decision was subject to be reviewed, overruled and destroyed by Judge Guy L. Fake of the same court.

M.

Whether when Judge Thomas G. Walker denied the motion of the defendant Utah Fuel Company to dismiss complaint his decision was not the law of the case as established in District Court and should have been treated by any other judge sitting in same case? And

N.

Whether on appeal to circuit court of appeals 3rd circuit No. 8027 the rulings of Judge Thomas G. Walker on motions numbered 1, 2, 3, and 4 did not become the matters and things adjudicated or res judicata or the law of the case? And

O.

Whether the ruling of this Court on petition for writ of certiorari (63 S. Ct. 993, 318 U. S. 789, 87 L. Ed. 1156) in substance affirmed the judgment of the Courts below?

P.

Whether the defendant (Utah Fuel Company) in the district court have had complied with the requirements (F. R. 12 (a) (1). If the court denies the motion . . . the responsive pleading may be served within 10 days after notice of the courts action.)

Q.

Whether having failed to file any responsive pleading or answer, the said defendant have suffered itself to an application and entry of default against it? And

R.

Whether under the state of facts, the status of the cause at that time, the application for the default of said defendant was justly and lawfully entered?

S.

Whether under the state of facts set forth in the record, an injunction restraining the conspirators involved in the conspiracy of and from carrying on the conspiracy set forth in the two complaints is not an absolute necessity and therefore justifiable; or the petitioner herein is to cross his hands or arms, remain inactive and permit the conspirators to carry on?

T.

Whether the motion for Decree on Mandate and on the default of the defendant Utah Fuel Company was justly and legally made and presented by the plaintiff below and petitioner here?

U.

Whether the facts set forth in the assignment of errors to the District Court and in the Proceedings under Judicial Code Sec. 21 (As amended by Act of August 24, 1937, Ch. 754, 50 Stat. 751, Sec. 13; p. 2, S. Ct. R's.) are sufficient in law disqualifying Judge Guy L. Fake from proceeding any further in the matter or cause? And U.a.

Whether Judge Fake assumed unwarranted and exclusive jurisdiction of the plaintiff's cause to destroy it while plaintiff and defendant reside in the Division of Trenton five and seven city blocks from the Federal Court House at Trenton, N. J.?

V.

Whether the defendants in civil No. 2800 were accorded their statutory rights to appear and answer and elected to try the suit for injunction on their motions to dismiss it?

W.

Whether motion number 1 as filed by counsel for Utah Fuel Company is the only motion permitted by Federal Rule 12 of the Federal Rules of Civil Procedure for the District Courts of the United States?

X.

Whether Judge Guy L. Fake did not deprive the district court of its jurisdiction when he called before him H. Collin

Minton, Jr., Counsel pro se, Utah Fuel Company et als and in open Court conspired with him and ordered and directed him to proceed and file his second motion to dismiss and for injunction and to destroy the plaintiff and his cause notwithstanding the previous decisions of the: 1. District Court; 2. Circuit Court of Appeals; and 3. This Court?

Y.

Whether paragraphs 1, 2, and 3 of the Opinion of Judge Guy L. Fake are supported by the basic grounds set forth in the first three Motions filed in Civil No. 2800? Or

Z.

Whether these said paragraphs are the judge's malicious imaginations based upon the fourth and only motion which he directed to be made and presented to him and to be watched to come up before him "because no other judge will hear you" for and in consideration of the sums offered to him by said counsel in open court (the amount involved)?

Za.

Whether the Companion Case Rule applies to and governs the suit on the Equity side of the Court for injunction and makes the Counts sustained by the rulings of Judge Thomas Glynn Walker applicable to the suit in equity?

Zb.

Whether the bill as filed on the equity side of the court is open to amendment if thought necessary?

Aa.

Whether the Utah Fuel Company's Motion for injunction and the Exhibits attached thereto, gathered from the States of Utah, New Jersey and New York and the District of Columbia, whereat overt acts in furtherance of the object of the conspiracy were committed, constitute adoption or ratification of every wrong committed in furtherance of the object of the conspiracy (Cooley on Torts, Sec. 76)?

Ba.

Whether the fact that the petitioner herein gave unto the defendant, Utah Fuel Company, his resignation of his compulsory assumption of the office or job of interpreter, legal local agent with "jurisdiction" over all cases between employer and employees, and refused to reassume or resume it when he was ordered by the officials of said defendant company, constitutes the said defendant's motive or reason for instituting the conspiracy set forth in the Record of the cause to destroy the petitioner herein and its former legal local agent at Clear Creek, Utah?

Bb.

Whether the defendant Utah Fuel Company and its contract doctors were motivated to refuse to the brother of

this petitioner hospitalization; the needed medical treatment and operation; pronounce him tubercular and incurable; and to put him out of its General Hospital thereby forcing the petitioner herein to remove his brother to private hospital and to bear all expenses of medical treatment and operation, hospitalization, and convalescent means to restore him to his normal health because of the petitioner's unwillingness to bear his share of the brunt of the said defendant's operations?

Ca.

Whether the plaintiff in the district court, appellant in the C. C. A. 3rd C. and petitioner here have had timely appealed from the Opinion and Orders signed and entered thereon, the Judgment of the District Court)?

Da.

Whether the appellant on appeal to the Circuit Court of Appeals Third Circuit fully and truly presented the issues in the cause to the said Court; and whether the said Circuit Court failed and neglected to adjudicate the issues so presented not with standing the fact that the appellees and their counsels failed to appear and argue their defense?

Ea.

Whether there is a conflict of decisions in the district court between the decision of Judge Thomas Glynn Walker and that of Judge Guy L. Fake in the same cause on the same facts, pleadings and Exhibits?

Fa.

Whether the Circuit Court of Appeals Third Circuit, in affirming the judgment of the District Court, is, or, is not:

a. In conflict with its own decision on appeal No. 8027, on substantially the same facts, between the same parties?

b. In conflict with the determination on application for writ of certiorari (63 S. Ct. 993, 318 U. S. 789, 87 L. Ed. 1156)?

c. In conflict with the decisions of every other circuit court of appeals of the United States?

d. In conflict with applicable decisions of this Court?

e. In conflict with the decisions of the district court in the same case, between the same parties, and substantially the same facts?

f. Whether it has decided important questions of Federal law in a way probable untenable or in conflict with the weight of authority?

g. Whether it has decided important questions of Federal law in a way probable in conflict with applicable decisions of this Court.

h. Whether it has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by the district court as in the judgment of this Court calls for the exercise by it of its powers of supervision.

1. CH. A. B. C.

A. The first question, therefore, is presented as to the venue in conspiracy cases, brought under the authority of Ch. 3 of Title 8 U.S.C.A. Sections 41, 43, and 47; and Title 15, Sections 15 and 26 U.S.C.A.; whether it must be in the State of Utah where the conspiracy was entered into or whether it should be in the State of New Jersey wherein numerous overt acts have been and continuously are committed?

B. Whether the plaintiff in the district court and petitioner here erred in complying with the provision of the Opinion of the United States District Court District of Utah adjudging and directing the petitioner herein to sue the Utah Fuel Company in the District Court of the United States for the District of New Jersey on the ground and for the reason that he was, and is, an alien, that is a citizen and subject of the Kingdom of Greece?

C. Whether the plaintiff below and petitioner here neglected to bring his suit timely or whether he was and still is impeded and obstructed of and from doing so?

REASONS FOR GRANTING THE PETITION.

Reasons A, B, C, D. These Reasons parallel and cover The Questions Presented.

1. This is an action on the case setting forth a malicious conspiracy or confederation with the means employed to effect its purpose and the resulting damages to the plaintiff in the district court and petitioner here. The basis of the

action are as stated in the Declaration, the fraudulent and malicious acts of the defendants in ruining the plaintiff; and in driving him out from State to State aiming to force him to submit to the object of the conspiracy.

2. The suit was first filed in the United States District Court for the District of Utah as No. 5547. In substance this said Court held that because and for the reason that the plaintiff was an alien and the Utah Fuel Company a corporation incorporated under the laws of the State of New Jersey, the suit should be brought in the District of New Jersey of which the defendant is an inhabitant and citizen on the authority of the case of Campbell v. Duluth.

3. The plaintiff felt himself aggrieved by the Opinion of said federal court because the said defendant-company is a powerful corporation and, directly and indirectly, owns almost the entire coal fields and coal mines in the State of Utah. Plaintiff also felt that the suit was then under the civil rights acts because he was then denied civil rights and it was so stated or held by Judge Johnson while on the Bench hearing the argument and ruling and stating to the defendants and their counsels that the suit was one under section 47 of Title 8 U.S.C.A.

4. The conduct of parties defendants in the suit and their counsels evidenced that the plaintiff have had no right to be or reside in Salt Lake City. Plaintiff appealed to Judge Johnson at his summer residence at Ogden Canyon, Utah but, all in vain. Thereupon plaintiff left the State of Utah and came to Washington, D. C. Here he presented his petition for mandate referred to on the caption but the Deputy Clerk refused to accept it. Thereafter he was arrested for refusing to drop the suit against the

said defendant-company et als. Plaintiff a defenseless person in the hands of sinister conspirators. The results? See the Declarations and Record of the cause.

5. The conspiracy was and is carried on with any and all successive overt acts to accomplish its purpose by any and all means money can buy. There was no let go in a single day during the life of said conspiracy, but with the assistance of the Office of Industrial Commission of Utah the plaintiff succeeded in establishing the merits of which the cause originated. See the Appendix to the Declaration. The conspiracy has barricaded and the record and exhibits show that it still barricades the District Court of the United States for the District of New Jersey ever since the year 1927, and the State Courts ever since the year 1925. The cause became notorious crime and the sinister conspirators are at it just the same. See the Record and Exhibits.

6. The venue of the cause has been established by the conspirators themselves. See United States v. Kissel; Hyde v. Shine; Brown v. Elliott; and Hyde and Schneider v. United States (pages 72-190 Appendix here).

7. The procedural Statute of the United States applying to and governing the cause is that provided by the law found in Revised Statute Sec. 722 (729 Tit. 28 U.S.C.A., 28 U.S.C.A. 729).

2. CH. D.

D. Whether the Statute of Limitations of the State of Utah applies to and govern the conspiracy set forth in the

twenty-five Counts of the Declaration or the cause is governed by the rule of law enunciated in United States v. Kissel, 218 U. S. 601, and applied in the case of Hyde and Schneider v. United States, 225 U. S. 347; and Brown v. Elliot, pages of the Appendix here?

(D). THE STATUTE OF LIMITATIONS PLEADED BY THE RESPONDENT UTAH FUEL COMPANY (pages 315-316 Record).

1. The respondent-company, by its officer and agent, H. Collin Minton, Jr., as its general counsel in charge of its business in the State of New Jersey, and in the capacity of General Counsel in the suit of the petitioner herein, and while the first suit against it (L-5773 U. S. D. Ct. D. of New Jersey) proceeding under color and cover of the Statutes and proceedings involved in the case of the State of Utah (43 U.S.C.A. Tit. 8) and with intent of depriving this petitioner of and from the right to sue the said respondent; by the only party in the suit, give evidence against its co-conspirators, and to receive the full and equal benefits of the laws involved and proceedings had for the security of his person and property (41 U.S.C.A. Tit. 8); and intending to deter, by intimidation or, and threats the petitioner herein from attending the district court of the United States for the District of New Jersey; and from testifying to the matters pending therein against it, and with intent and for the purpose of impeding, hindering, obstructing and defeating in every manner the due course of justice in the said court of the United States (47 U.S.C.A. 8) (page Appendix) appeared before Hon. Phillip Forman, U. S. D. J. sitting as a court in the hearing of motions and proceeding therebefore, to-wit: We hold

that he is not well yet, . . . He suffered enough. All we want at this time is to dismiss this suit and allow him to go on (23rd and 24th Counts of Declaration, pages 33-34) and the further threat to the Court, to-wit: No, we will bring the Attorney General of the State of Utah to help us. Thus he obstructed the administration of justice by the said court and impeded the adjudication of the conspiracy.

2. The present Declaration (728 U. S. D. Ct. N. J.) was filed January 12, 1940. The respondent-company and its attorney were served with summonses and copy of Declaration upon each one of them. Appearing therein they filed a general demurrer to the declaration (pages 5-6-7-8 Record) to the 1st, 2d, paragraphs 36 to 39, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 23rd, 24th and 25th Counts. Responding to this said Demurrer, the petitioner herein filed an Opposing Affidavit (pages 8 to 45 Record).

3. A similar demurrer (pages 45, 46, 47 Record) including the statute of Limitation, was filed by Addison P. Rosenkrans as counsel for the parties defendants citizens and residents of the State of New Jersey and pleading, together with other defenses, the sum or value of the matter in controversy; to which demurrer (or motion) the petitioner herein responded by filing his Opposing Affidavit (pages ½ of page 47 to 62 and nine Supporting Affidavits (pages 63-72 Record).

4. A similar Demurrer was filed by Carol C. Johnson, 68 William Street, N. Y. (pages 83 to ½ of 86 Record), to which demurrer the petitioner herein filed an Opposing Affidavit (pages ½ of 86 to 108 Record).

5. Petitioner herein, being anxious to adjudicate the conspiracy, on the 13 day of May, 1940, filed Notice of Motion for Commission, and written Interrogatories to take the depositions of witnesses who have first hand knowledge of the criminal conspiracy now before the Court; at the same time and in proper form and appropriate proceeding to take depositions of PARTIES AND WITNESSES RESIDING IN the State of Utah who openly operated the conspiracy for years, and offering to advance the costs for taking the same. Decision Reserved. (WALKER.) These matters are thus held up by the said district court.

6. On November 19, 1941, a Memorandum of Finding of Facts and Conclusions of Law (pages 18, 19, 20, 21, and 2/3rds of page 22 of the Bill in Equity for Injunction; and pages 352-356 Record) was entered by District Judge Thomas Glynn Walker, from which appeal No. 8027, C.C.A. 3rd C. was taken, in so far as to those defendants discharged by Judge Walker; on which appeal the said C.C.A. 3rd C. entered the following Opinion, to-wit: Before MARIS, JONES AND GOODRICH, CIRCUIT JUDGES PER CURIAM:

For the reasons sufficiently set forth in the memorandum opinion of Judge Walker filed November 19, 1941, the orders of the district court from which the plaintiff has appealed are affirmed.

A true Copy: Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit (pages Record); before Mandate issued and/or, final judgment, and laboring under the provisions of Rule 38 of the said circuit court, the petitioner herein applied to this Court for Writ of Certiorari (No. 779) to be issued to said circuit court; the reported case

shows that this Court affirmed the Opinion of the said circuit court of appeals.

7. Notwithstanding the judgments and decrees of the Courts, the said respondent-company failed and neglected to file its responsive pleading (Fed. Rule 12 (a) (1)) or to apply to the court for relief from the determination of Judge Walker and thereupon the petitioner herein applied for default (pages 275-280 Record) and decree pro confesso

8. The petitioner herein have had enough injustice done to him before Judge Guy L. Fake and he was positive of the fact that said judge will proceed and destroy the cause thus adjudicated and the petitioner himself (pages 39th; 40th; 43rd; 45th of the Rephotostated Exhibits attached to the respondent's motion for injunction). For the foregoing reasons the petitioner herein applied to the circuit court of appeals 3rd circuit by petition (No. 8397) for designation or assignment of a district judge to proceed to final judgment. The cause came on to be heard and argued and while arguing his cause the Court insisted that Judge Guy L. Fake was the Senior Circuit Judge within the meaning of Sec. 24 (Judicial Code Sec. 20). Your petitioner herein took an exception to the ruling of said court and theretofore he was warned to the effect that there are no exceptions allowed in that court and dismissed the proceedings.

9. Thus the petitioner herein was forced to leave the division of the Court at Trenton, N. J., where he resides going now on his fourth year and to go to the division of said Court at Newark so that Judge Fake may proceed and destroy the cause and the petitioner himself; and thereupon he moved for decree on mandate; and counsel for the

defendant-company moved to dismiss the counts on which Judge Walker sustained their demurrer. Both said motion came on to be heard and argued before Judge Guy L. Fake on the 28th day of June, 1943. Respondent's said motion is not in the Record but it will be supplied if it can be located because the Deputy Clerk at Newark says he cannot find it.

10. On the said hearings, or would have been hearings, the whole proceedings became a mask, because Counsel for the Respondent, Judge and Court were swept to the fatal end of an irresistible of hatred and passion with Judge Guy L. Fake leading the mob. There were no one to correct the wrongs perpetrated by the said Judge and Counsel, H. Collin Minton, Jr., Counsel pro se and for Utah Fuel Company et als.; and there before both of them bursted into statements of exposure of their past and present conducts and activities in their endeavors to destroy the petitioner herein and his cause. Judge Guy L. Fake bursted out first as follows:

Are you going to pay this judgment? A. Mr. Minton. No! I am now moving to dismiss the Courts on which our motions were sustained and then I will move to dismiss his case . . . (confidential) Fake, J. It's a shame to pay a judgment like this. It involves considerable amount of money. He deserves what he is getting. Make the motion and watch it to come up before me because no other judge will hear you. Said counsel interrupting. I will make the motion and watch it to see that it comes up before your honor. Fake, J. That's right, make the motion—we do justice according to what is good for the government. He already has a project under consideration to revolutionize the world. He is a mining engineer of great ability and after so many years in there he came out without a scath.

He is good man. Said counsel interrupting. Good man! He is another Cicero. We are unable to defend this case. Fake, J. You know that he is another Cicero and you want to destroy him, eh? We will see what we can do. Fake, J. I was over there and they were there at Ridgewood and Paterson. I knew all about his case while there and our former President appointed me here to deal with and take care of his case. He is radical. Did you hear the argument he made in the Circuit Court of Appeals on the hearing of his appeal there? And here I hold him incompetent and dismiss his cases. Said Counsel. I was there! We will pay to your honor the full amount involved if you will dismiss his cases. We cannot defend this case. Fake, J. Do not tell me those things here because those fellows back there are here to see what disposition I will make with his case. Said counsel. What? He can't do nothing. He can't go to the Circuit Court of Appeals because he insulted them the last time we were there. He has no place to go. Fake, J. He might go to the Greek Consul in New York and have him come here and bawl us out. Said counsel. There is nothing there. . . . Fake, J. He is upright and if this is cleared he will be in here every day and we will not stand to see him. Said counsel. He cannot practice because he is not a member of the Bar. Fake, J. Yes, but he is a professor and has several cases here. That's all he wants. If he tries them he would not want any more cases. All this is illegal. Watch the lawyers. Watch Weinberger. He might go there. He went there before and did not take his case. At the present status of the case he might take it. Said counsel. He is as good as Weinberger. Fake, J. What? Weinberger is a deceiver and this here is upright. We have him (Weinberger) here and we know him. Make the motion. Said counsel. We will pay the full amount involved into the Fund if you destroy him. Fake, J. What

Fund? A. By said Counsel. There is established a fund for the re-election of the President and we will pay the full amount involved into said Fund if your honor will destroy him. Fake, J. You know more about that than I do. Said counsel. We will pay the full amount involved into the Fund and give the Mormon votes if you do—will destroy him; because he will go back there again and they will not stand to see him there. Fake, J. His farm! A. Yeh. Make the motion. All right. I will make the motion. Judge Fake. He must die in poverty a martyric death because he fights the President. Make the motion. Judge Fake made further statements regarding woman and it is pitiful to hear a judge go off his duties like that (See Proceedings under Judicial Code Sec. 21 pages Record; The Assignment of Errors, pages 287-303 Record; last paragraph of page 8 and on to page 10 of the Brief to Appeal to Circuit Court of Appeals, 3rd Circuit No. 8664; paragraph 4 of petitioner's opposing affidavit, opposing motion to dismiss case pursuant to 104-2-23 R. S. Ut., pages 311-315 Record.

11. CIVIL NO. 2800. Apprehending the consequences of the activities of the defendants and their co-conspirators, and in order that he may safeguard his person, your petitioner herein filed Civil No. 2300 on the Equity side of the Court for Injunction. See the Bill. There is and there was no way out of the hands of the conspirators. Therefore an injunction was and is an absolute necessity. Petitioner does not interfere with the operations of the business of any one of the conspirators or those who take part in the conspiracy; nor is he interferes with the operations of the respondent Utah Fuel Company; and has not and never have had any difference with the laws of the State of Utah.

12. The defendants to the bill, appearing therein, filed three motions (pages 112-113 is the motion of the Utah Fuel

Company; pages 155-157 is the motion of Addison P. Rosenkrans and William V. Rosenkrans; and pages 195-197 is the motion of George Lavdas and Louis Antonopoulos Record. Each one of these motions is opposed by petitioner's Opposing Affidavit. Pages 197-209 Record.

13. In pursuance to the understandings had as aforesaid (paragraph 10 just above) Judge Guy L. Fake failed to take judicial notice of the determinations of every other court in the case; and failed to take notice of the issues made by the pleadings; and the effect of the companion case rule applicable to the suit on the equity side of the Court, but proceeded and handed down an Opinion (pages , Record) dismissing the suit in equity and preparing the way to assist the respondent company and its counsel to dismiss Civil No. 728. To-wit: The allegations against this REMAINING DEFENDANT DISCLOSE ALLEGED CLAIMS WHICH HAVE LONG SINCE BEEN OUTLAWED BY THE Statute of Limitations. However, in the absence of an answer pleading the statute of limitations, the complaint cannot be dismissed at this time.

14. The claim alleged in the First Count owes its origin on contract in force long before the Industrial Act of the State of Utah was enacted. When the said Industrial Act was enacted it adopted the Medical system OF THE RESPONDENT Utah Fuel Company as it was maintained by contributions paid in by the employees. All those contracts in force then became a part of the Industrial Act of the State of Utah (42-1-50 R. S. Ut.) U. S. Constitution, Art. I —Sec. 10.—Powers Denied to the States. Cl. 1—Impairment of Contracts. When the State Supreme Court of the State of Utah has once interpreted those contracts (pages 45-110 of Appendix to the Declaration in Case No. 728),

those interpretations became a part of those contracts (Sauer v. New York, 206 U. S. 536; Muhlker v. New York & H. R. Co., 197 U. S. 544, 570). Furthermore, after the said Industrial Act had been settled by judicial construction of the Courts of the State of Utah, the construction became, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision operates as an impairment of the obligation of contract. Douglas v. Pike County, 101 U. S. 677, 687; Louisiana ex rel Southern Bank v. Pilsbury, 105 U. S. 278, 295. Settled judicial construction by the State Courts and the Industrial Commission may be deemed to have been incorporated into those contracts. Chicago v. Sheldon, O. Wall, 50.

15. Summing up the situation of the cause now before the Court will say thus:

a. On or about the 10th day of September, 1927, your petitioner herein removed his brother, Mr. Dan Curtis, from St. Mark's Hospital, Salt Lake City, Utah to Holy Cross Hospital in that city and placed him under the care of Drs. Tindale, Hatch, Middleton, Allen & McHugh and Sister Superior and paid all doctors' and hospital's bills and cared for his brother until he came back to his normal health up to or about the end of said year.

b. In the State of Utah, all courts are open, and every person, for an injury done to him in his person, property or reputation, has remedy by due course of law, which is to be administered without denial or unnecessary delay; and no person can be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party (Constitution of

Utah, Article 1, Section 11. (Courts Open. Redress of injuries.) (41 U.S.C.A. Title 28.)

c. An action upon a contract, obligation or liability not founded upon an instrument in writing; . . . may be commenced at any time within four years after the last charge is made or the last payment is received (104-2-23, R. S. Ut. And again: An action for relief not otherwise provided for must be commenced within four years after the cause of action shall have accrued 104-2-30. Action for Relief Not Provided for. Citing Action on the case within meaning of statute.

d. Your petitioner herein filed his first suit in U. S. Dist. Ct. Dist. of Ut. April 25th, 1919. This would be about one year and five months after he paid up the bills for which the said defendant have had received pay for the same. The said defendant appeared specially and pleaded and insisted:

Comes now Utah Fuel Company, one of the defendants in the above entitled cause . . . only purpose of objecting to and challenging the jurisdiction of above entitled Court over the person of this defendant, and moving to quash, vacate, set aside and annul the service (etc.).

That at the time of the commencement of this suit, and prior thereto, this defendant, Utah Fuel Company, was not, and it is not now, and it never has been a citizen of nor an inhabitant of, nor a resident of, nor did it reside in the District of Utah wherein this suit is brought . . . Utah Fuel Company was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, . . . a citizen, resident and inhabitant of the District of New Jersey, . . . and Nicholas J. Curtis was and is an alien, citizen and subject of Kingdom of Greece. . . . Filed May 8, 1919. John W. Christy, Clerk. On 3rd

day of June, 1919, said case was dismissed. (See 45 S. Ct. 353, 267 U. S. 582, 69 L. Ed. 798.) The Petition for Mandate in this Court is printed and the judgment of the Fed. D. Ct. D. of Ut. is embodied and printed in the Record.

e. As for the consequences which followed after the dismissal of said suit see the eighth count of the Declaration. Further, up to April 20, 1924, except few months during the year 1923 when he printed the said Petition for this Court (please see it) and thereupon he was arrested in his home at Salt Lake City, Utah, for proceeding with this matter, he was incarcerated and held for deportation or death; at that time he was deported out of the State of Utah in the custody of one Christ Zavis. Two arrests followed one at Denver, Colo., and one in the District of Columbia but in both places no information was issued and it all appeared that both of them were made to terrorize.

f. In the month of October, 1925, on the trial of a claim for wages in the Paterson District Court, William V. Rosenkrans, attorney for the defendant, exhibited to the Court a copy of the said printed Petition made to this Court and confronted your petitioner with the matters and things set forth therein, the suit against the Utah Fuel Company; on that ground every cent due and unpaid for wages was defrauded (Counts 21st and 22d. Declaration). Ever since then the conspiracy is carried on in the States of New Jersey and New York (E-2331, 1927; E-4129, 1930; E-5109, 1935; L-1722, 1928; L-4628, 1934; L-4659, 1934; L-5773, 1936; Civil 728, 1940; Curtis v. Collis Bros., Bergen County D. Ct., N. J.; Curtis v. Woll, So. D. N. Y.; Curtis v. Peraino, three time these cases, Ridgewood D. Ct. and Bergen County Circuit Court, one case, N. J.; Police Court, Newburgh, N. Y., one case, Police Court Poughkeepsie, N. Y.,

one case; Social Security, three cases.) Each and every one of said causes is the result of overt acts in furtherance of the same and single conspiracy. The Federal District Court dismissed all cases before it on false orders and contrary to the appeals made by your petitioner. Every cent earned, and collected, because good part of it has been defrauded, has been expended in self defense, defending his person and the right to work and earn a living. (See Record, pages 336-340.) District Judge Guy L. Fake, according to his own statements made while on the Bench, has assumed personal jurisdiction since 1929 and insisting to have and to hold it to the end of the life of your petitioner, writing false opinions and signing false orders freely (pages 1 to 5; 8-9-1011; Brief C.C.A. 3rd C. presented as an Exhibit (pages 1 to 5; 8-9-10-11; Brief C. C. A. 3rd C. presented as an Exhibit). He now pleaded or directed to be pleaded in his Opinion, the statute of limitation. The cause now before the Court is not governed or controlled by the Statute of Limitations of the State of Utah because the provisions of that statute were satisfied when the suit was first filed in the U. S. D. Ct. D. of Utah (d) supra (R. S. Ut. Ch. 5. Manner of Commencing Action. 104-5-1. By Filing Complaint or Service of Summons. A civil action shall be commenced by the filing of a complaint with the Clerk of the Court in which the action is brought, or by the service of a summons. (C. L. 17. Sec. 6538.)

g. The Certifications of Dr. Tindale and Dr. Hatch (pages 63-64 Declaration) fully sustain the claim against the defendant Utah Fuel Company.

h. The Judgment of the U. S. District Court for the District of Utah is the law of the case and defendant insisted that it be sued in the U. S. Court in the District of New Jersey, in which it is an inhabitant, citizen and resident

and in order to defeat the Court's jurisdiction it resorted and put in force and operation the conspiracy set forth above and in the Record of the Case.

i. The Statute of Limitations was satisfied when the suit was first filed and became inapplicable to overt acts committed in furtherance of the conspiracy and outside the Territorial limits of the State of Utah.

j. The cause is governed by the rule of law announced by this Court and applied in the cases of U. S. v. Kissel; Hyde and Schneider v. U. S.; Brown v. Elliott (Appendix pages 72-190.

k. Limitation runs only from time of cessation of overt acts, where damages result from consequences of one continuous wrong (Montgomery v. Crun, 161 N. E. 251 (13-16) Limitation of Actions—key 55 (1)—

At page 259. Injury precedes damages. Hence, damages susceptible of ascertainment resulting from injuries to person would ordinarily be the test for determining when a cause of action exists (17 R.C.L. 765), but where as here, "the action is for the damages resulting from the various consequences of one continuous wrong" (Gunder v. Tibbits, 153 Ind. 591, 55 N. E. 762) the statute of limitation will not begin to run until there is a cessation of the overt acts constituting the wrong. (Farneman v. Farneman, 46 Ind. App. 453, 458, 90 N. E. 775, 91 N. E. 968.) The conspiracy charge(s), if proved, is effective to enlarge the group of persons each responsible for the acts of the others, not only in continuing the wrong, but for damages resulting from each other's acts. Eacock v. State, 169 Ind. 488, 498, 82 N. E. 1039; McKee v. State, 111 Ind. 378, 12 N. E. 510.

1. Where a wrongful act result in a recurring or continuing injury, there is a cause of action, not only for the injury consequent upon the original act, but also for such successive ones as may result in the future in which case the statute attaches at the time of the occurrence of the injury." Arkebauer v. Talcon Zinc Co., 12 S. W. 2d 916 (5-6) citing 17 R.C.L. 785; Allison Bartlett v. Grassell Chemical Co., 92 W. Va. 445, 115 S. E. 451, 27 A.L.R. 54.

m. LIMITATIONS. Time from which statute runs in general. A conspiracy continues, so far as the Statute of Limitations is concerned, so long as there is a course of conduct in violation of law to effect its purpose. Ryan v. U. S., 216 F. 13, 132 C.C.A. 257, cer. de. 34 S. Ct. 603, 232 U. S. 726, 58 L. Ed. 816; Overt Acts as Controlling in General.

n. Any act in execution of the original plan may be regarded as a renewal of the original combination, and may be prosecuted against any one participating, personally or through others. U. S. v. Reddin, 193 F. 793.

3. CH. E. F.

E. Whether the conspiracy set forth in the twenty-five Counts of the Declaration as supplemented by the Bill on the Equity side of the Court No. 2800 and additional Affidavits thereto is governed by the inhibition of the law found in section 112 of Title 28 U.S.C.A. or it is governed by the authorities of the cases just cited above (Q. Pre-D.)?

F. Whether the proceeding here bring up before this Court a cause coming on under the general jurisdictional

rule of the district court or is a cause whose jurisdiction was predicated upon the inhibition of the law found in Chapter 3 of Title 8, Sections 41, 43, 47 (2)(3), and Sections 15 and 26 of Title 15 U.S.C.A.; and therefore within the inhibition of the law found in R. S. Sec. 722 (729 U.S.C.A. Title 28); and Section 103 of Title 28 U.S.C.A.; and Sec. 5 of Tit. 15, U.S.C.A.?

1. The case is one of exceptions from the general rule governing the inhibition found in Section 112 of Title 28 U.S.C.A.; and it is governed by the inhibition of the law found in Sections 41, 43, 47 of Title 8 U.S.C.A., and Section 729, Title 28 U.S.C.A.; and also of the inhibition of the law found in Section 103 of the same Title. Reviewing the authorities on the subject there is to be found as follows:

2. In Westor Theatres v. Warner Bros. Pictures, 41 F. Supp. 757, (12) the Court said: The district court's jurisdiction is the creature of the Acts of Congress enacted in pursuance of the Constitution and apart from the powers inherent in a lawfully constituted judicial tribunal. It has no jurisdiction other than that legislatively conferred upon it; (13) citing J. Harvey Ladew, et al. v. Tennessee Copper Company, 218 U. S. 357, 31 S. Ct. 81, 54 L. Ed. 1069.

3. And in the case of Sun Oil Co. v. Burford, 130 F. 2d Headnote 23. Courts key 258. It is therein set forth as follows:

Federal District Courts are given power to receive jurisdiction only by the Federal Constitution, and such jurisdiction is conferred solely by the Congress of the United States. . . . 15. It is true of all civil actions in the federal courts except as otherwise provided by federal statutes or Federal Rules of Civil Procedure 16. (Rule 82 provides:

"These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." As to particular remedies provided by State laws, see Rules 4 (d) (2) (7), 64 and 69 of the Federal Rules of Civil Procedure. Act of June 1, 1874, c. 200, 18 Stat. 50, 28 U.S.C.A. Sec. 728; Sections 722, 915, 919, and 933 of the Revised Statutes of United States, 28 U.S.C.A. Secs. 729, 726, 732, 746.

4. 729 U.S.C.A. Title 28; 3 F.R.D. at p. 447.

In respect to many matters not covered by federal statutes, the common law prevails. As to others, state law is followed, at times the law as it existed on the date of the admission of the State into the Union and at times the current state laws. 9. Holmes v. United States, 269 F. 96, 98 (C.C.A. 5th) Scaffidi v. U. S., 37 F. 2d 203, 207 (C.C.A. 1 1930); United States v. Eagan, 30 F. 608 (D.C. E.D. Mo. 1887); United States v. Clune, 62 F. 798; U. S. v. Olmstead, 7 F. 2d 756, 758 (D.C. W.D. Wash. 1925); 28 U.S.C.A. 729.

5. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of Chapter 3 of Title 8, and Title 18, for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect. Section 729 of Title 28 U.S.C.A. (R. S. Sec. 722). See the section in full on pp. 8-9 of first part of printed record as printed for the C.C.A. 3rd C.

6. The matters set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any establish

prima facie the laws of the United States. U.S.C.A. 1941, Title 1, Section 54 (a); Revised Statutes and Supplements as Evidence of the Law, Act of June 20, 1874, c. 333, Sec. 2, 18 Stat. 113; Act of Mar. 2, 1871, c. 26, 20 Stat. 27; Acts of June 7, 1880, No. 44, 21 Stat. 308; April 9, 1890, c. 73 Sec. 3, 26 Stat. 50.

7. If an act is against the law, it is against the United States, and if against the United States, it is because it is against the laws, and by "laws" is meant "statutory laws." Parker, D. J. in re Walf (D. C.) 27 Fed. 606-611.

8. Federal Law. Law administered in federal courts. (36 C. J.) Law, p. 959, citing Morris-Turner Live Stock Co. v. Director Gen. of Railroads, 266 Fed. 600, 601. See also Fed. Cts. 25 C. J. p. 679.

See and consider subd. (1) last sentence of Sec. 41 of Title 28 U.S.C.A.; Subd. (2); Subd. (12); Subd. (14); Subd. (17); Subd. (23).

U.S.C.A. Title 28, Section 103. When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein. (R. S., Sec. 731; Mar. 3, 1011, c. 231, Section 42.) The Jurisdiction in civil and criminal matters conferred on district court by the provisions of Chapter 3 of Title 8 . . . shall be exercised and enforced in conformity with the laws of the United States.

9. Article I, Sec. 8, paragraph 18 of the United States Constitution, gives Congress power to make all laws which shall be necessary and proper for carrying into execution

the foregoing powers and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof.

Congress, therefore, has authority to make laws necessary and proper to extend the judicial power effectively over such controversies, even when developed in State Courts. Congress is the primary judge of what is necessary and proper. Hoffman v. Lynch, 23 F. 2d 518 (9) page 522. See also U. S. v. American Brewing Co., 1 F. 2d 1001 (2); U. S. v. Hudson, 11 U. S. 32, 7 Cranch 32, 3 L. Ed. 259.

10. "Where a statute (of the United States) creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive. United States F. & Guaranty Co. v. John R. Alley & Co., Inc. et al., 34 F. Supp. 604 (2) quoting: In Barnet v. Muncie Nat. Bank, 98 U. S. 555, 25 L. Ed. 212. Citing Bk. Dearing, 91 U. S. 29.

Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy the punishment or the remedy can be only that which the statute prescribes. Stafford v. Ingersoll, 3 Hill 38; First Nat. Bank of Whitehill v. Lamb, 57 Barb. 429.

The Statutes (Sections 103 and 729 of Title 28 U.S.C.A.) are remedial as well as penal, and are to be liberally construed to effect the object which Congress had in view in enacting them. Gray v. Bennet, 3 Met. 539.

11. Federal Rules of Civil Procedure are not intended to affect the substantive rights of individuals which are fixed by federal statute. Federal Rules of Civil Procedure for the District Courts, rule 82 (d), 28 U.S.C.A. following Sec. 723, U. S. Fidelity & Guaranty Co. v. John R. Alley & Co., 34 F. Supp. 904 (5).

12. In other words, conformity (Sec. 112 of Tit. 28 U.S.C.A.) applies only in the absence of direct Congressional legislation upon the subject, Hughe's Federal Practice, Vol. 6, Ch. 78, Sec. 3562, citing: (Berry v. Mobile & O. R. Co., 228 F. 395) and goes no further than to provide a general rule regulating practice and procedure in the absence of express Congressional enactment on the subject, and does not repeal any previous act of Congress expressly requiring a particular mode of proceeding in any given class of cases (Wear v. Mayer, 6 F. 658-660). See also: American Dig. 2d Dec. Ed. Courts, Sec. 340. Effect of United States Statute Regulating Procedure; 13 Cent. Dig. Courts Sec. 900. 8 U.S.C.A. 47 (2), (3). Obstructing justice key 71.

13. "Administration of justice" means performance of acts or duties required by law in discharge of duty. Rosen v. United States, 10 F. 2d 975. (2) Administration of justice means the "performance of acts or duties required by law in discharge of their duty." Rosen v. U. S. supra citing: Bels v. Lacy (Tex. Civ. App.) 111 S. W. 215.

14. The statutory words "due administration of justice" has been considered from various angles.

15. In Wilder v. United States, 11/3 F. 433, 74 C.C.A. 567, as means free and fair opportunity to learn what any litigant may desire to know concerning the material facts in any litigation. And in 1 C. J. 1239 has adopted from an early case the statement that the administration of justice "includes everything connected with the determination of the rights of persons and property, every agency provided by law for the accomplishment of that purpose, and every step in the proceeding * * * to the established law of the

land" (C. J.) p. 139. Administration of justice. Note 73. State v. Post, 6 Oh. S. & C. P. 200, 206, 4 Oh. N.P. 157 (a). "The term administration of justice is a broad and comprehensive term. It means something more than the mere trail of a cause. It includes everything connected with the determination of the rights of persons and property, every agency provided by law for the accomplishment of that purpose, and every step in the proceeding and process by which such determinations are embodied in a final determination therein, according to the established. State v. Post 6 supra.

(b) "Due administration of justice"—Under a statute making it a criminal offense to corruptly or by threats or force "obstruct or impede the due administration of justice" in any court of the United States, the words "due administration of justice" import a free and fair opportunity to every litigant in a pending cause in a federal court to learn what he may learn (if not obstructed or impeded) concerning material facts and to exercise his option as to introducing testimony as to such facts, and an offense is committed under such statute if a person corruptly endeavors to induce other persons who have knowledge of facts which may be material to a party to a pending cause to conceal or deny their knowledge so as to prevent such party from obtaining knowledge or procuring evidence of such facts, citing the Wilder case supra.

16. FORTY-NINTH CONGRESS. SESS. II, Chap. 137, March 3, 1887. Sec. 1 . . . ; and no civil suit shall be brought before either of said courts (Circuit and District) against any person by any original process of proceeding in any other district than that whereof he is an inhabitant; . . .

Sec. 5. That nothing in this Act shall be held, deemed, or construed to repeal or effect any jurisdiction or right mentioned . . . in seven hundred and twenty-two, . . . of the Revised Statutes of the United States, or mentioned in section eight of the Act of Congress approved March first, eighteen hundred and seventy-five, entitled "An Act to protect all citizens in their civil or legal rights."

4. CH. G. H.

G. Whether the defendants in the district court were accorded their statutory rights and privileges by giving to them every opportunity to present their defenses by appearing and presenting to the court the truth of their side of the cause?

H. Whether the sum or value of the matter in controversy is material as to those parties co-defendants or, coconspirators, residents of the State of New Jersey and citizens of the United States?

1. Reason G. The existence of jurisdiction creates an implication of duty to exercise it (McClelland v. Garland, 217 U. S. 268). The judicial authority of the United States is to be exercised and enforced pursuant to the provisions of the U. S. Const. and the Acts of Congress of the United States and the common law. Id. McClelland v. Garland. The Act of Congress found in R. S. 722 (729 U.S.C.A. 28) is procedural concerning the administration of cases arising under the Civil Rights Acts, Ch. 3 of Tit. 8 and crimes and offenses against the laws of the United States.

2. Cases arising under the Civil Rights Act are to be accorded the procedure accorded to the administration of

the criminal laws of the United States. Rev. Stat. Sec. 722 provide: "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of Ch. 3 of Tit. 8 and Tit. 18 (pages 8-9 Record). It follows that the defendants were given their statutory opportunity to be heard and to present the truth of their side of the cause, including their Official Records of the places in which they incarcerated the petitioner herein for suing the respondent Utah Fuel Company. See also pages 8-33 Record, and pages 87-108 Record.

3. Any and all statutes (Sec. 5 of Tit. 15 U.S.C.A.) Bringing in additional parties (July 2, 1890, c. 647, Sec. 5, 26 Stat. 210) of the United States which are suitable for carrying into effect the Courts' jurisdiction over the cause are made applicable to and govern the procedure followed in the cause (Rev. Stat. 722 (729 U.S.C.A. 28; 103 U.S.C.A. 28).

4. PROCESS: As it has been said, Congress has the power to regulate the whole process of the Federal Courts. 23 U. S. 51, 6 L. Ed. 264, this Court said:

By the 14th section of the Judiciary Act (2 L.U.S. 62) power is given the Courts of the United States to issue a writ of scire facias, habeas corpus, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. That . . . summonses are among the writs hereby authorized to be issued, cannot admit of a doubt; they are indispensably necessary for the beneficial exercise of the jurisdiction of the Courts. . . . It doubtless embraces writs sanctioned by the principles and usages of the common law. (377 U.S.C.A. 28.) (R. S. 716; Mar. 3, 1911, c. 231, Sec. 262, 36 Stat. 1162.) (28 U.S.C.A., Sec. 13.) Same:

5. Section 377. (Judicial Code, Section 262.) 28 U.S.C.A. Sec. 377.

Power to issue writs. The Supreme Court, the circuit court of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law. Citing the Act supra.

6. Note 64 under said section: Process or summons—Power to issue. Citing: U. S. v. Virginia-Carolina Chemical Co., 163 F. 66.

7. Note 65. Issuance to another district: U. S. Standard Oil Co. of Indiana, 154 F. 722. Where some of the defendants charged with criminal conspiracy in restraint of interstate commerce, are corporations (citizens) of other states, but the conspiracy was in part carried on within a district, and some of the defendants are inhabitants of the district and found there, the court of that district has jurisdiction, and may issue its process to the marshal of other districts, where the nonresident (citizen defendants) corporations may be found and served. U. S. v. National Mallable & Steel Casting Co., 6 F. 2d 40. Preservation of section under Rule 81, Fed. R. Civil Procedure. See Note by Advisory Committee under R. 81. The Section has been preserved.

8. The section was enacted by Congress in order to meet cases where there is no specific process provided by statute. John Gund Brewing Co. v. U. S. 206, Fed.

U. S. v. Fullheart 47 F. 802, quoted from re: Subold, 100 U. S. 871, on page 895 . . . This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. . . .

9. Bradford et al. v. City of Sumerset, Ky. et al., 138 F. 2d. 308, holding: District Court of United States are given jurisdiction by Title 28 U.S.C.A. Sec. 41 (14) over suits brought under the Civil Rights Act without the allegation or proof of any jurisdictional amount. Hague v. C.I.O., 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423. In the light of the above decision of the Supreme Court announced subsequent to the order of the District Court in the case, it follows that the trial court had jurisdiction over the suit, without allegation or proof of the jurisdictional amount. See also: Kerr v. Enouch Pratt Free Library, 54 F. Supp. 514, (1), (2), (3).

10. U.S.C.A. 43. Douglas v. Keannett, 319 U. S. 161, 87 L. Ed. 1324, 63 S. Ct. 877. (Headnotes (1), (2): (13) at p. 131.) In any event, an injunction looks to the future. Texas Co. v. Brown, 258 U. S. 466, 475, 66 L. Ed. 721, 725, 42 S. Ct. 375; Standard Oil Co. v. U. S., 283 U. S. 163, 182, 75 L. Ed. 926, 952, 51 S. Ct. 421.

11. Courts 424.—Federal Courts. 1. Allegation and proof that the value of the matter in controversy exceeds $3,000 is unnecessary in a suit in a federal district court, brought under the Civil Rights Act (8 U.S.C.A. 43); Oney et al. v. Oklahoma City et al., 120 F. 2d 861; Viles v. Symes, 129 F. 2d 828; Snowden v. Hughes, 132 F. 476.

12. In O'Sullivan v. Felix, 5 Cir. 194 F. 88, the Court says:

The petitioner predicated jurisdiction upon an alleged cause of action under legislation enacted by Congress during the reconstruction period. (Act April 20, 1871, Ch. 22, Sec. 1, 2, 11 Stat. 13), and now embodied in the U. S. Code

(8 U.S.C.A. Secs. 43-47). The latter section (47) expressly authorizes an action for the recovery of damages. Such an action, unless the claim made is purely colorable, is an action based upon the laws of the United States as to which the federal courts have jurisdiction. O'Sullivan v. Felix, supra, affirmed, 233 U. S. 318, 34 S. Ct. 596, 58 L. Ed. 980; McClaine v. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500; Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 41 S. Ct. 243, 65 L. Ed. 577; In re Toburus Parrott, 1 Fed. at p. 520.

5. CH. I.

I. Whether the clause "against any one or more of the conspirators" in Section 47 (3) and Section 43 of Tit. 8 U.S.C.A. means that that is a statutory privilege given to plaintiff to bring his suit against more than one of his joint wrong doers?

REASON I.

1. Rule 20 of the New Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723 governs the situation. In substance, that provides that joinder of parties defendant is permissible if the claim or claims alleged in an action arise out of a series of transactions or occurrences and there is any question of law or fact common to all of them which will arise in the action. This case does arise out of the same series of occurrences and there are a number of common questions of fact and law in issue. Goddard, D. J. in McNally v. Simons et al., D. C. S. D. N. Y. See pp. 12, 13, and 14. Printed Parts of the Record.

2. Yes, the defendants in the suit were properly joined. Joint Tort Feasors—May be joint. Brown v. Southern Pacific Co., 31 U. 318, 88 P. 7;

3. R. S. of Ut. 104-3-13. Id. Defendants. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein;

4. Fraud.—Of all parties to fraud. White v. Texas Co., 202 P. 826, 59 U. 180;
Criminal.—All guilty. State v. Morgan, 22 U. 162, 61 P. 527; State v. King, 24 U. 482, 68 P. 418;

5. Cheating of property.—Statute includes real estate as well as personal property. State v. Blake, 105 P. 910, 36 U. 605;

6. "Torts".—Actions properly joined which arise out of continuous, official acts. Wilson v. Sullivan, 17 U. 341, 53 P. 14;

7. Several causes of action arising out of injuries with or without force to person and property of either may be joined. Thomas v. Bythe, 44 U. 1, 137 P. 396;
Continuous tortious acts may be combined to avoid multiplicity of suits. Willson v. Sullivan, 17 U. 341, 53 P. 994;

8. Acts which constitute but a single wrong may be commingled even though, if separately stated, different defenses would apply. Reese v. Qualtrough, 48 U. 23, 156 P. 955. In this case the Supreme Court of the State of Utah says:

There is no reason whatever why the complaint should not be held good. Where facts are commingled in a complaint so that, if they were separated, different defenses would apply, or where a defendant might have a good defense to a certain group of facts constituting a cause of action which he does not have to all the facts as they are commingled in the complaint, the courts do not hesitate to require the plaintiff to separate the facts into separate causes of action so as to permit the defendants to intelligently meet all the matters set forth in the complaint. Where, as in this case, however, the wrongful acts complained of are of such a character, and are so numerous and continuous and so blended together, that in legal effect they constitute but a single wrong or transaction, a segregation will not be required. If, under such circumstances, segregation were required, then the acts of each day would have to be stated separately as constituting separate and independent wrongs and causes of action. Please see the case as reported. See also Joint Wrongs. Cooley on Torts, Vol. 1, Ch. V. p. 223, and cases cited thereunder.

9. Perjury and its subornation have been defined and considered as part and parcel of the same offense. 3 Coke Institutes 167; 2 Bishop Criminal Laws Secs. 1056, 1197. They were treated as such by the Congress in the Act of April 3, 1790, Ch. 9, Sec. 18, 1 Stat. 116. Their separation into two cognate sections in subsequent revisions of this original statute, 18 U.S.C.A. Secs. 231, 232, hardly import a difference in substance. Any general distinction between perpetration and procurement (. . .) no longer obtains. 18 U.S.C.A. Sec. 550. Clark, C. J. in Re United States v. Silverman, C.C.A. Third Circuit, Sept. 7, 1939. 106 F. 2d. 75.

See also the following cases and cases in point:

Ruthenberg v. United States, 245 U. S. 480, 483, 38 S. Ct. 168, 62 L. Ed. 414;

United States v. Bakes, C.C.A. 7th C. 107 F. 2d. 579, (6);

Pon Wing Quong v. U. S., C.C.A. 9th C., April, 1940, 111 F. 2d. 257;

Backun v. United States, C.C.A. 4th C., June 10, 1940, 112 F. 2d. 635;

United Cigar Whelan Stores Corp. et al. v. United States, 113 F. 2d. 340;

United States v. Hodorowicz, C.C.A. 7th C. 105 F. 2d. 218 (7);

Page v. United States, C.C.A. 5th C., 94 F. 2d. 591, (4);

Robinson et al. v. United States, 94 F. 2d. 752, (2), (3), (4);

Schrader v. United States, C.C.A. 8th C., 94 F. 2d. 926 (1);

Alexander v. United States and 3 others, C.C.A. 8th C., 95 F. 2d. 875;

Ginsberg v. United States, C.C.A. 5th C., 96 F. 2d. 433, (13);

What is done and said by co-conspirators in execution of their enterprise is admissible against all. Cr. Code Sec. 332, 18 U.S.C.A. Sec. 550.

6. CH. J, K, L, M.

J. Whether District Judge Thomas Glynn Walker had not fully considered and deliberately decided motions numbered 1, 2, 3 and 4 (Rulings, pages , Record; 17-22 Bill in Equity; 2 F.R.D. 570-571)?

K. Whether the said decision was not a controlling precedent in every other hearing before any other district judge

of the same court sitting in the same case; and whether Rulings on Motion No. 4 were not of equal effect as those on motions Nos. 1, 2, and 3? And

L. Whether the said decision was subject to be reviewed, overruled and destroyed by Judge Guy L. Fake of the same Court?

M. Whether when Judge Thomas G. Walker denied the motion of the defendant Utah Fuel Company to dismiss complaint his decision was not the law of the case as established in District Court and should have been treated by any other judge sitting in same case?

1. Where the demurrer (motion) is to a pleading setting forth the distinctly specific facts touching the merits of the action or defense, and final judgment is rendered thereon, it would be difficult to find any reason in principle why the facts thus admitted should not be considered, for all purposes, as fully established as if found by a jury, or admitted in open court. If the party against whom a ruling is made on a demurrer wishes to avoid its effect as an admission of the facts in the pleading demurred to, he should seek to amend his pleading or answer, as the case may be. . . .

If he does not ask for such permission, the inference may justly be drawn that he is unable to produce the evidence, and that the fact is as alleged in the pleading. Courts are not established to determine what law might be upon possible facts, but to adjudge the rights of parties upon existing facts; and if their jurisdiction is invoked, parties will be presumed to represent in their pleadings the actual, and not supposeable, facts, touching the matters. The law on this subject is well settled in Could's Treaties on Plead-

ing, a work of recognized merit in this country, as follows: 'A judgment, rendered upon demurrer, is equally conclusive (by way of estoppel) of the facts confessed by the demurrer, as a verdict finding the same facts would have been; since they are established, as well in the former case as in the latter, by way of record. And facts thus established, can never afterwards be contested, between the same parties, or those in privity with them. Van Fleet's Former Adjudication. Demurrer Matters settled upon, are res judicata, pp. 672-674, at page 672.

Sec. 664 Van Fleet's above.

2. If a cause is reversed (affirmed) in a higher court the lower one is bound to proceed in accordance with the opinion sent down. . . . it would work injustice to overturn these rules on a second appeal, and these again on a third, and so on, ad infinitum. The suit might never end. Besides, it would be very undignified, and tend to bring the courts into merited disrespect, if the lower court should be compelled to retrace its steps on one appeal, and then to trace them back again on a second, and so on. Hence, with a few exceptions, it is a rule that a matter decided on appeal becomes, in effect, res judicata in that cause; (Price v. Price, 23 Ala. 60 and four prior cases); Chicago, M. & St. P. Ry. Co. v. Hoyt, 44 Ill. App. 48; Moshier v. Norton, 100 Ill. 63, 75; Wabash, St. Louis and Pac. Ry. Co. v. Peterson, 115 Ill. 597 (7 N.E.R. 485, and 6 N.E.R. 412); Drake v. Chicago, R. I. & P. Ry. Co., 70 Iowa 59 (29 N.W.R. 804); Paland v. Chicago, St. L. & N.O.R. Co., 44 La. Ann. 1003 (11 S. R. 707); Cumberland Coal and Iron Co. v. Sherman, 20 Md. 111, 131; Brown v. Somerville, 8 Md. 444, 454; Eyler v. Hoover, 8 Md. 1; Hamond v. Inleses, 4 Md. 138, 164; Emory v. Owings, 3 Md. 178; Young v. Frost, 1 Md. 377; McDonald v. Green, 9 Sm & M. (17 Miss.) 131, 141; O'Donohue v.

Hendrix, 17 Neb. 286 (22 N.W.R. 548;) Rogers v. Rochester, 21 Hun (28 N. Y. Supreme) 44; Thompson v. Howley, 16 Oregon 251 (19 Pac. R. 84); Warren v. Raymond, 17 S. Ct. 163, 189; Willis v. Smith, 72 Tex. 569 (10 S.W.R. 683); Truner v. Staples, 86 Va. 30 (9 S.E.R. 1123); Hall v. Lawther, 22 W. Va. 570, 574; Board of Education v. Parson, 24 W. Va. 551, 554; Roberts v. Cooper, How. (61 U. S. 467) or as it is frequently expressed, it becomes "the law of the case" in all its subsequent proceedings. Bryant v. Booth, 35 Ala. 269, and three prior cases; Perry v. Little Rock and Fort Smith Ry. Co., 44 Ark. 383, and six prior cases; People v. Hollady, 192 Cal. 661 (36 Pac. R. 927), and five prior cases; Lee v. Stahl, 13 Colo. 174 (22 Fla. 386); Crockett v. Crockett, 75 Ga. 202, 211, and twelve prior cases; Nickless v. Pearson, 126 Ind. 477, 488 (26 N.E.R. 478), and four prior cases; Adams County v. B. & M. R.R. Co., 55 Iowa, 94 (2 N.W.R. 1054); Norton v. Huntoon, 43 Kan. 275 (22 Pac. R. 565); Suns v. Reed, 12 B. Mon. (51 Ky.) 51; Stillwell v. Glascock, 47 Mo. App. 554; and three prior cases; Powell v. Dayton, S. & G.R.R. Co., 14 Oregon 22 (12 Pac. R. 665); St. Croix Lumber Co. v. Mitchell, S. Dakota (57 N.W.R. 236); Clay v. Clay, 2 Texas Unreported cases 257, 365.

Mem. The Decision of the Commercial Union of America, Inc. v. Anglo-South American Bank, Ltd., 10 F. 2d 937, which is printed in the Appendix here is pleaded here with like force and effect as if it was set forth here. To the same effect and with like force the cases quoted therein.

3. Judgments key 728. Irving Nat. Bank v. Law, 10 F. 2d 721, (6). Judgments key 726.—If a case is decided on one or more grounds, each ground is a good estoppel. Kessler v. Armstrong Cork Co., 158 F. 744, 85 C.C.A. 642 (C.C.A. 2). Similarly, if the decision of a court on a point

of law is based upon several grounds, each is equally authoritative on all, and no one is obiter. Railroad Co. v. Schutte, 103 U. S. 118, 26 L. Ed. 327; U. S. v. Chamberlin, 219 U. S. 250, 31 S. Ct. 155, 55 L. Ed. 204; U. S. v. Title Ins. Co., 265 U. S. 472, 44 S. Ct. 621, 68 L. Ed. 1110.

4. In the case of Railroad v. Schutte, supra, the Court proceeded: It cannot be said a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.

And in the case of United States v. Title Ins. Co., supra, the Court proceeded: Where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, "the ruling on either is obiter, but each is the judgment of the court, and of equal validity with the other. Union Pacific R. Co. v. Mason City & Ft. D. R. Co., 199 U. S. 160, 166, 50 L. Ed.; 134, 26 Sup. Ct. Rep. 19; Florida Cent. R. Co. v. Schutte, 103 U. S. 118, 143, 26 L. Ed. 327, 336.

5. Ruberts, J. in Mayo v. Lakeland Highlands Canning Co., 309 U. S. 521, 60 S. C. 521. (3) . . . Such findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal.

(4) The record does not warrant a judgment of dismissal. The Complaint raises constitutional questions of due

process, equal protection, and violation of the obligation of contract; conclusiveness of the Findings of Fact and Conclusions of Law by the District Court. National Reserve Ins. Co. v. Scuder, 71 F. 2d. 884; Railroad Commission v. Maxey, 281 U. S. 82, 83, 74 L. Ed. 716; Cherry-Vurrele Co. v. Thatcher, 107 F. 2d. (8) on page 69; Storley v. Armour & Co., 107 F. 2d. 499, citing H. H. Cross Co. v. Simons, 8 Cir., 96 F. 2d. 482, 486; Crowell v. Baker Oil Tools, 9 Cri., 99 F. 2d. 574, 577; Healy C. J. in Occidental Life Ins. Co. v. Thomas, 107 F. 2d. 875; Green Valley Creamery v. U. S., 108 F. 2d. 342, (7) on p. 347; U. S. v. Borg-Waren Corporation, 108 F. 2d. 424, (4) on p. 427; C. C. A. 7th (1939); American Home Fire Assur. Co. v. Hargrove, 109 F. 2d. 86; Nicholas v. Minnesota Mining & Manufacturing Co. (C. C. A. 4th) 109 F. 2d. 162 (1) on p. 163; Gray McFawn & Co. v. Hegarty, Conroy & Co. Inc. et al. (C.C.A. 2d.* 109 F. 2d. 443 (3); Kurn et al. v. Beasley County Judge, C.C.A. 8th C.) 109 F. 2d. 687 (3), Gray v. United States, (C.C.A. 8th C.) 109 F. 2d. 728; Pullman Co. v. Chicago & N.W.R. Co., (C.C.A. 7th) 110 F. 2d. 425, (1) (2); Syracuse Engineering Co. v. Haight, 110 F. 2d. 468, (6); City of Sumter et al. v. Spur Distributing Co., C.C.A. 4th, Mar. 15, 1940, 110 F. 2d. 649 (1, 2); Goodacre v. Panagopoulos et als., C.C.A.D. of C., 110 F. 2d. 716, (1), (2); Creel v. Hudspeth, Warden, C.C.A. 10th C. Mar. 21, 1040, 110 F. 2d. 762, (4) on p. 763; Pers v. Hudspeth Warden C.C.A. 10th C. Mar. 21, 1040, 110 F. 2d. 812, (1), (5); Arenstien v. American Soc. of Composers, Authors and Publishers et al., D. C. S. D. of N. Y., 29 Fed. Supp. 388, (10), (11); Central R. Co. of New Jersey v. Central Hanover Bank & Trust Co. et al., 29 F. Supp. 826, (3). Under Civil Procedure Rule relating to findings by Court formal findings of fact and conclusions of law separately stated take place of opinion written by Court on the facts or law in an injury cause or proceeding; Clark Bros.

Co. v. Portex Oil Co., C.C.A. 9th, 113 F. 2d. 45 (4) on p. 47; Continental Oil Co. v. Jones, C.C.A. 10th C., 113 Fed. 2d. 557, (6); Atlas Beverage Co. et al. v. Minneapolis Brewing Co., C.C.A. 8th, 113 F. 2d. 672, (6); Bein Co. v. Landy, Collector of Internal Revenue, C.C.A. 8th, 113 F. 2d. 897, (1); Mississippi Valley Timber Co. v. Mengel Co. et al., C.C.A. 5th C., 112 F. 2d. 947; Hayes v. Kelly et ux., C.C.A. 9th C. 112 F. 2d. 897, (1); Sevens v. Edwards et al., C.C.A. 5th C. 112 F. 2d 534, (3); Edwards v. Lain, C.C.A. 7th C. 112 F. 2d. 343, (2); In re Mount Holly Paper Co. v. Davis et ux., C.C.A. 3rd C.; Automobile Ins. Co. of Hartford Conn. v. Springfield Dyeing Co. Inc., C.C.A. 3rd. C. Feb. 1940; Samuel White v. James A. Johnston, No. 697, 313 U. S. 538, 85 L. E. 1507, 61 S. Ct. 834; Ford Motor Co. v. Nat. Labor Relations Board, 205 U. S. 364; Oil Shares Incorporated v. Commercial Trust Co. et al., 304 U. S. 551; Federal Circuit Court of Appeals must follow decisions of other such federal courts. McConald v. U. S. (C.C.A. Minn. 1937) 89 F. 2d. 128, cer. denied. 1937, 57 S. Ct. 925, 301 U. S. 697, 81 L. Ed. 1352, rehearing denied 1937, 58 S. Ct. 4, 302 U. S. 773, 82 L. Ed. 599.

7. CH. N. O.

N. Whether on appeal to circuit court of appeals 3rd circuit No. 8027 the rulings of Judge Thomas G. Walker on motions numbered 1, 2, 3, and 4 did not become the matters and things adjudicated or res judicata or the law of the case? And

O. Whether the ruling of this Court on petition for writ of certiorari (63 S. Ct. 993, 318 U. S. 789, 87 L. Ed. 1156) in substance affirmed the judgment of the courts below? (Argument, page 1 et seq. of Appendix.)

8. CH. P., Q., R. & S.

P. Whether the defendant (Utah Fuel Company) in the district court have had complied with the requirements (F. R. 12 (a) (1). If the court denies the motion . . . the responsive pleading may be served within 10 days after notice of the courts action.)?

Q. Whether having failed to file any responsive pleading or answer, the said defendant have suffered itself to an application and entry of default against it? And

R. Whether under the state of facts, the status of the cause at that time, the application for the default of said defendant was justly and lawfully entered?

T. Whether the motion for Decree on Mandate and on the default of the defendant Utah Fuel Company was justly and legally made and presented by the plaintiff below and petitioner here?

1. The subject is now governed generally by rule 55 of the rules of civil procedure which covers entry of defaults, the judgment to be rendered, and authorities setting aside defaults upon "good cause" shown, all as more particularly hereinafter set forth.

(5a) Subdivision II. Existence and Entry of Default. Sec. 3255. What constitute default.

2. A default may occur by failure "to plead or otherwise defend" as provided by the Rules of Civil Procedure (Rule 55 (a). Default is usually taken either for failure to appear

(citations) or to plead (Hall v. Houghton & Upp. Mercantile Co., 60 Fed. 350; Seawell v. Crawford, 55 Fed. 729; Fowle v. Bowre, Fed. Cas. No. 4, 994, 3 Cranch C. C. 291) within the time allowed by the rules; but it may also be taken for willful failure of a party or of an officer or managing agent of a party to appear for taking of a deposition, or failure to serve answers to interrogatories (Rule 37 (d) of the Rules of Civil Procedure. Former Equity Rule 58 was of similar purport). A failure to answer within the time prescribed after overruling of a precedent motion undoubtedly presents an opportunity for default. Tallman v. Ladd, 5 F. 2d 582, (under prior equity practice); Southern Pacific R. Co. v. Temple, 59 Fed. 17; Ozark Land Co. v. Leonard, 24 Fed. 660, motion for modification of supersedeas denied 115 U. S. 465, 29 L. Ed. 445, 6 Sup. Ct. 127.

3. (Sec. 3255 Cont. on page 412 of Vol. 7, Cyc. of Fed. Proc.)

(56) Entry of Default. Rule 55 of the rules of civil procedure provides, by paragraph (a) for the entry of default by the clerk upon a failure to plead or otherwise defend, and then, by paragraph (b) for the entry of default judgment.

O'Hara v. McConnell, 93 U. S. 150, 23 L. Ed. 840; Scofield v. Horse Springs Cattle Co., 65 Fed. 433, citing Thomson v. Wooster, 114 U. S. 104, 29 L. Ed. 105, 5 Sup. Ct. 788; United States v. Whitmire, 188 Fed. 422.

These are obviously two distinct steps, although there is nothing in rule 55 to prevent them from being simultaneous except the requirement in sub paragraph (b) (2) of three-day notice if the party against whom judgment is to be taken appeared (Rule 55 (b) 2.)

Application under former equity rules, See W. & W. Fuse

Co. v. Trumbull Electric Mfg. Co., 183 Fed.; Austin v. Riley, 55 Fed. 833.

4. (6) Subdivision III. Opening, Vacating or Setting Aside Default.

Sec. 3270. Application and Showing.

A motion to open or set aside a default must be made within a "reasonable time," in no case exceeding six months after judgment taken, in accordance with the rule as to relief against judgments generally Rule 60 (b) of the Rules of Civil Procedure, referred to by Rule 55 (c).

5. Cyc. Fed. Proc. Sec. 1692. In interstate Commerce Commission v. Daley, 26 F. Supp. 427, defendant sent in, but did not file, his answer. Upon request of the clerk for the requisite fee defendant's counsel wrote the clerk that defendant did not desire to contest the petition. Judge McLellan denied a motion for judgment on the pleadings but said that a default might be entered under Rule 55 (b) (2) upon application therefore by plaintiff.

Orange Theatre Corporation v. Rayherstz Amusement Corporation et al. No. 7899 Circuit Court of Appeals Third Circuit. Argued February 20, 1942; Re-argued May 18, 1942. Decided Aug. 9, 1942.

BEFORE: BIGGS, MARRIS, JONES, and GOODRICH, CIRCUIT JUDGES.

GOODRICH, C. J.

(1) . . . (2d clause) The guiding mandate of the Federal Rules is that "they shall be construed to secure the just, speedy, and inexpensive determination of every action (citing Rule 1).

(2) We have then this situation: the stipulations extending the time were ineffective and the defendants are in the position of having failed to plead or otherwise to defend within twenty days allotted under rule 12 (a). They are therefore in default. There has been no entry of default in accordance with Rule 55 (a) (Citing note 14 (a). (The following part is set out underneath the Reported case.)

Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.") (Returning to the Decision.)

But that entry is a purely formal matter.

6. The Default of the defendant Utah Fuel Company.

Federal Rules of Civil Procedure for the District Courts of the United States. Rule 60. After expiration of six months, court was without authority to relieve defendant from an order (Application and Order thereon) of default. Cassell v. Barness, 1 F.R.D. 15; quoted in H. Fed. Pr. Pocket Part p. 144 Proctor, Justice. In view of the six months time limitation, stated in Rule 60 (b) Rules of Civil Procedure for District Courts, 28 U.S.C.A. following section 723c, the court is without authority at this time to relieve defendant of the order of default. Accordingly, the motion to vacate default is denied. See Moran v. Moran, 31 F. Supp. 227; And this period may not be enlarged: Nachod & United States Signal Corp. v. Automatic Signal Corp., 32 F. Supp. 588; Reed v. Southern Atlantic Steamship Co., 6 Fed. Rules Serv. 601-31, case No. 1; Cavallo v. Agwillines, Inc., S. D. N. Y. 1942, 6 Fed. Rul. Serv. 60b.31, case No. 2, 2 F.R.D. 526.

FEDERAL RULE 12. (a) (1).

Paragraph 1.
Kohloff v. Ford Motor Co., D.C.N.Y., 27 F. Supp. 803.

9. CH. S.

S. Whether under the state of facts set forth in the record, an injunction restraining the conspirators involved in the conspiracy of and from carrying on the conspiracy set forth in the two complaints is not an absolute necessity and therefore justifiable; or the petitioner herein is to cross his hands or arms, remain inactive, and permit the conspirators to carry on?

REASON (T).

1. The petitioner herein is living in his sixtieth year. He was born in the year 1883 in Leukas, Greece. A farmer and lived there up to the spring of the year 1907, except few months when he lived in Piraieus, Greece. He was a modest farmer on the line of two counties. He enjoyed the love of the people of both counties and of strangers. He was never inside of a jail except as a visitor two-three times. He was never made a defendant in any case civil or criminal and on his last day there he planted potatoes. He emigrated in the State of Utah in the winter of the year 1907. Though in a foreign land, he gained the reputation he had in his own home land. There he lived a loving life in the best of friendship with all. He was advanced by the respondent-company to be the head of all other Greeks it employed there. But his clean life and upright forward

did not permit him to keep on going along with the officers and agents of said respondent. It would mean shooting to death for him for his part of the operations of said respondent. The said respondent was greatly benefited by his services and considered him as too dangerous to its operations after he gave up his connections as interpreter. To remedy this it established the conspiracy which is now before the court.

2. The influence of said respondent are such as to move to its aid the authorities of the State of Utah and they unjustly join in the conspiracy and they unjustly remain to its side aiding it in every way. See pages , Record; their brief on appeal No. 8027; and in this Court on proceedings for certiorari. They have no cause of action and never had one. There is no one in the State of Utah who has been molested or injured by this petitioner. Nevertheless, they carry on with the respondent company against right and justice and the Constitution and laws of the State of Utah, and the Constitution and laws of the United States.

3. The grounds for the injunction are set forth in 104-17-2 (pages , Record). R. S. of Ut. It follows that the injunction is a matter of right, because the acts of the respondent and those of the authorities of the State of Utah are continuing, ruinous, and the damages irreparable, and the remedy at law is inadequate. Strawberry Valley C. Co. v. Chipman, 13 U. 454, 45 P. 348. May we ask them to produce their records?

4. (21 C.J.S. Sec. 195, at page 340.)

DECISION IN COMPANION CASE.

A decision in one case is controlling as the law of the case, or at least as authority, in a companion case involving the same subject matter, and in which the points of decision and facts are the same, 81.

81 Miller v. Travelers Ins. Co. of Hartford, Conn., 80 F. 2d 502, certiorari denied 56 S. Ct. 682, 298 U. S. 660, 80 L. Ed. 1385; Williams v. State, 171 So. 390, 27 Ala. App. 292; American Equitable Assur. Co. of New York v. Bailey, 147 So. 446, 25 Ala. App. 303, certiorari denied 147 So. 448, 226 Ala. 393; Schwalb v. Riel, 282 P. 876, 86 Colo. 492; State ex rel Chalmers v. Sholtz, 163 So. 926, 121 Fla. 514; Sheffield v. Tabb., 173 S. E. 124, 178 Ga. 255; Prudential Ins. Co. of America v. Richman, 11 N. E. 2d 132, 292 Ill. App. 637, transferred 4 N. E. 2d 76, 264 Ill. 234; Marks Adm'r v. Commonwealth, 124 S. W. 2d 762, 276 Ky. 514; City of St. Louis v. Pope, 126 S. W. ed. 1215; Secerholm v. City of Port Arthur, Civ. App., 3 S. W. 2d 925, affirmed Lyner v. La Coste, Com. App. 13 S. W. 2d 685 and Lyner v. Keith, Com. App. 12 S. W. 2d 687; Conner v. State, 111 S. W. 2d 266, 133 Tex. Cr. 390; Brown v. State, 91 S. W. 2d 139, 129 (Tex. Cr. 625). Including a subsequent suit on the same cause of action, for the same relief whether it is independent of or ancillary to the original action. 82.

82 Becker Steel Co. of America v. Cummings, C. C. A. N. Y. 95 F. 2d 319, certiorari denied 59 S. Ct. 64, 305 U. S. 604, 83 L. Ed. 384. Where two cases are jointly tried (heard) as companion cases, and are appealed on separate records but involving the same questions on appeal the decision in one case is conclusively as to the other case, 83. Fidelity & Casualty Co. of New York v. Raborn, 172 So.

896, 27 Ala. App. 455; Krauenbahl v. House, 107 S. W. 2d 328, 269 Ky. 511; Dossett v. Missouri State Life Ins. Co. Com. App., 277 S. W. 620, reversing Missouri State Life Ins. Co. v. Dossett, Civ. App., 265 S. W. 254, and rehearing denied Dossett v. Missouri State Life Ins. Co., 284 S. W. 949.

10. CH. U., Ua.

U. Whether the facts set forth in the assignment of errors to the District Court and in the Proceedings under Judicial Code Sec. 21, as amended by the Act of August 24, 1937, Chapter 754, 50 Stat. 751, Section 13, are sufficient in law disqualifying Judge Guy L. Fake from proceeding any further in the matter or cause? And

Ua. Whether Judge Fake assumed unwarranted and exclusive jurisdiction of the plaintiff's cause to destroy it while plaintiff and defendant reside in the Division of Trenton five and seven city blocks from the Federal Court House at Trenton, N. J.?

Ch. (U.-Ua.). The argument and authorities under Ch. (D) above pages is repeated here with like force as if it had been set out again hereunder.

Petitioner herein says that the statements made by Judge Guy L. Fake in open court as they are confirmed by the wording and phraseology of his Opinion in the two causes are malicious per se as well as criminal per se under the laws of the United States (see hereafter) and need no further comment. For the very idea that one man may be compelled to hold his life or the means of living, or any material rights essential to the enjoyment of life, at the

mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. Supreme Court of the United States in Yick Wo. v. Hopkins, 118 U. S. on p. 369, parts of case hereunder, (paragraph 6).

REASON U and Ua.

WHITAKER v. McLEAN, 118 F. 2d 996. No. 7573.

1. UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA. DECIDED FEB. 24, 1941.

1. Judges Key 49 (2).

Where during the trial but in the absence of jury trial judge made remarks which few, if any, judges would make, in the course of trial, unless they had developed definite and positive hostility to plaintiff and his case, and judge directed verdict for defendant, judgment was required to be reversed since hostility is a form of bias.

See Words and Phrases, permanent Edition, for all other definitions of "bias".

2. Judges Key 49 (1).

The policy underlying the statute providing for the disqualification of a judge for bias is that the Courts of the United States shall not only be impartial in controversies submitted to them, but shall give assurance that they are impartial. Jud. Code Sec. 21, 28 U.S.C.A. Sec. 25.

3. Judges Key 49 (1).

A right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a "fair trial,"

and if before a case is over a judge's bias appears to have become overpowering, it disqualifies him. Jud. Code Sec. 21, 28 U.S.C.A. Sec. 25.

See words and Phrases, permanent Edition, for all other definitions of "Fair Trial".

Appeal from the District Court of the United States for the District of Columbia.

Action by Norman T. Whitaker against Evalyn Walsh McLean.

From an adverse judgment, plaintiff appeals.

Reversed and remanded.

Norman T. Whitaker; pro se. Nelson T. Hartson, Edmund L. Jones, and Howard Boyd, all of Washington, D. C., for Appellee.

Before GRONER, CHIEF JUSTICE, and Miller and Edgerton, Justices.

PER CURIAM.

In a colloquy with counsel, during the trial though in the absence of the jury, the judge who tried this case made remarks which caused the plaintiff's attorney to express the opinion that he could not very well go on because the judge's remarks evidenced bias and prejudice. At the conclusion of the colloquy, the trial proceeded, and at the close of the testimony, the judge directed a verdict for the defendant.

The plaintiff appeals.

(1-3) The judge may, as indeed he insisted, have felt no hostility to the plaintiff, and in that view he was subjectively free from bias. But bias must be considered objectively. Few, if any, judges would make the reported remarks, in the course of a trial, unless they had developed definite and positive hostility to plaintiff and his case.

Hostility is a form of bias. When a judge has shown bias before trial, section 21 of the Judicial Code, 28 U.S.C.A. Sec. 25, provides means of disqualifying him. The policy underlying section 21 is that the courts of the United States "Shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial." Berger v. United States, 255 U. S. 22, 36, 41 Sup. Ct. 230, 234, 65 L. Ed. 481. A bias which develops during the trial and is "grounded on the evidence" has been held not to be within the terms of section 21. Craven v. United States, 1 Cir. 22 F. 2d 605; certiorari denied 276 U. S. 627, 48 S. Ct. 321, 72 L. Ed. 73. Often some degree of bias develops inevitably during the trial. Judges cannot be forbidden to feel sympathy or aversion for one party or the other. Mild expressions of feelings are as hard to avoid as the feelings itself. But a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial. If, before a case is over, a judge's bias appears to have become overpowering, we think it disqualifies him. It follows that the judgment must be reversed. This is the more regrettable because it is our impression, based on an examination of the record, that the claim on which the plaintiff sued was probably without merit.

Reversed and remanded.

2. VICTOR L. BERGER ET AL. v. UNITED STATES, 255 U. S. 22, 41 S. Ct. 230, 65 L. Ed. 481 on p. 233 of 41 S. Ct.:

Mr. Justice McKenna delivered the Opinion of the Court.

(5) Our interpretation of section 21 has therefore no deterring consequences, and we cannot relieve from its

imperative conditions upon a dread or prophecy that they may be abusively used. They can only be so used by making a false affidavit, and a charge of and the penalties of perjury restrain from that—perjury in him who makes the affidavit; connivance therein of counsel, thereby subjecting him to disbarment. And upon what inducement and for what achievement—no other than trying the case by one judge rather than another, neither party or counsel having voice or influence in the designation of that other; and the section in its care permits but "one such affidavit."

But if we concede, out of deference to judgment, that we respect a foundation for the dread, a possibility to the prophecy, we must conclude Congress was aware of them and considered that there were countervailing benefits. At any rate we can only deal with it as it is expressed and enforce it according to its expression. Nor is it our junction to approve or disapprove it, but, we may say, that its solicitude is that the tribunals of the county shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any "bias or prejudice" that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. Its explicit declaration is that upon the making and filing of the affidavit, the judge against whom it is directed "shall proceed no further therein, but another judge shall be designated in the manner prescribed in * * * section twenty-three to hear such matter." And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and if prejudice exist it has worked its evil and a judgment of

it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient. 1

3. MITCHELL v. UNITED STATES, C.C.A. 10th C. March 6, 1942. 126 F. 2d 550.

1. Judges Key 51 (4).

When party files affidavit of trial judge's disqualification because of personal bias against affiant or in favor of opposite party, the truth of all of allegations of fact contained therein is admitted and it becomes duty of court to determine only its legal sufficiency, and if affidavit meets requirements of statutes and is accompanied by certificate of counsel of record, presiding judge can proceed no further but is disqualified. Jud. Code Sec. 21, 28 U.S.C.A. Sec. 25.

2. Judges Key 49 (1).

The purpose of statute relating to trial judge's disqualification because of personal bias or prejudice is to secure for all litigants a fair and impartial trial before a tribunal completely divested of any personal bias and it is duty of all courts to scrupulously adhere to such admonition and to guard against any appearance of personal bias. Jud. Code Sec. 21, 28 U.S.C.A. S2c. 25.

3. Judges Key 51 (3).

Before BRATTON, HUXMAN, and MURRAH, Circuit Judges.

MURRAH, Circuit Judge.

(1) Section 21 of the Judicial Code, 28 U.S.C.A. Sec. 25, provides that when a party to a civil or criminal pro-

ceedings shall make and file an affidavit that the judge before whom the proceedings is to be tried or heard has a personal bias or prejudice either against him or in favor of an opposing party, such judge shall proceed no further but instead another judge shall be designated to act; that the affidavit shall state the facts and the reasons for the belief that such bias and prejudice exists, and shall be filed not less than ten days before the beginning of the term of court or good cause shall be shown for failure to do so, and that no such affidavit shall be filed unless accompanied by a certificate of counsel of record and that such affidavit and application are made in good faith. When such an affidavit is filed, the truth of all of the allegations of fact contained therein is admitted, and it becomes the duty of the court to determine only its legal sufficiency, and if the affidavit meets the requirements of the statutes and is accompanied by a certificate of the counsel of record, the presiding judge can proceed no further but is disqualified. Scott v. Beams, 10 Cir., 122 F. 2d 777; Berger v. United States, 255 U. S. 22, 41 S. Ct. 230, 65 L. Ed. 481; Henry v. Speer, 5 Cir., 201 F. 869; Lewis v. United States, 10 Cir., 14 F. 2d 369; Nations v. United States, 8 Cir., 14 F. 2d 507, certiorari denied 273 U. S. 735, 47 S. Ct. 243, 71 L. Ed. 866; Craven v. United States, 1 Cir., 22 F. 2d 605; certiorari denied 276 U. S. 627, 48 S. Ct. 321, 72 L. Ed. 738; Morris v. United States, 10 Cir., 26 F. 2d 444.

(2, 3) The purpose of this section is to secure for all litigants a fair and impartial trial before a tribunal completely divested of any personal bias or prejudice, either for or against any party to the proceedings, and it is the duty of all courts to scrupulously adhere to this admonition and to guard against any appearance of personal bias or prejudice which might generate in the minds of litigants

a well-grounded belief that the presiding judge is for any reason personally biased or prejudiced against their cause. But the statute, by its own terms, provides a safeguard against the abuse of the privilege granted by the statute, and that well-founded safeguard is the requirement that the affidavit must be accompanied by a certificate of counsel of record, and without which the affidavit is ineffectual to disqualify the judge. This requirement is founded on the assumption that a member of the bar or counsel of record will not indulge in reckless disregard of the truth, and further attest to the good faith and belief of the affiant. Beland v. United States, 5 Cir., 117 F. 2d 958, certiorari denied 313 U. S. 585, 61 S. Ct. 1110, 85 L. Ed. 1541; Cuddy v. Otis, 8 Cir., 33 F. 2d 577; Morse v. Lewis, 4 Cir., 54 F. 2d 1027; Currin v. Nourse, 8 Cir., 74 F. 2d 273; Newman v. Zerbst, 10 Cir., 83 F. 2d 973.

4. This Petitioner may not be compelled to hold his life, Liberty and Property or the means of living at the mere will of Judge Fake of the Court Below.

AMERICAN JURISPRUDENCE, VOL. 12. CONSTITUTIONAL LAW, p. 257. G. DISCRIMINATORY ADMINISTRATION OF LAWS.

Sec. 566. Generally.—The purpose of the equal protection clause of the Fourteenth Amendment to the Federal Constitution is to secure every person within the state's (United State's) jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents (Sunday Lake Iron Co. v. Wakefield Twp., 247 U. S. 350, 62 L. Ed. 1154.

An actual discrimination arising from the method of administering a law is as potential in creating a denial of equality of rights as a discrimination made by law. Rogers v. Alabama, 192 U. S. 226, 48 L. Ed. 417, 24 S. Ct. 257; Tarrance v. Florida, 188 U. S. 519, 47 L. Ed. 1411.

ENCYCLOPEDIA OF UNITED STATES SUPREME COURT REPORTS. VOL. 4. CONSTITUTIONAL LAW. P. 402.

5. HOSTILE DISCRIMINATIONS FORBIDDEN.

6. Yick Wo v. Hopkins, 118 U. S. on p. 369, last paragraph.

When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the presence of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as undivided posses-

sions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and of men." For the very idea that one man may be compelled to hold his life or the means of living, or any material rights essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

There are many illustrations that might be given of the truth, which would make manifest that it was self evident in the light of our system of jurisprudence.

11. CH. V. W.

V. Whether the defendants in civil No. 2800 were accorded their statutory rights to appear and answer and elected to try the suit for injunction on their motions to dismiss it.

W. Whether motion numbered 1 as filed by counsel for Utah Fuel Company is the only motion permitted by Federal Rule 12 of the Federal Rules of Civil Procedure for the District Court of the United States.

REASON V.

1. The parties in the suit were accorded their statutory rights and the Docket Entries sustain this Statement.

REASON W.

2. Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used. Federal Rule 7 (c).

Weaver v. Mark, 112 F. 2d 917; Shell Petroleum Corp. v. Stueve, 25 F. Supp. 879; Gay v. E. H. Moore, Inc., 26 F. Supp. 749; Howard v. Puget Sound Mortgage Co., 31 F. Supp. 318; Rudco Oil & Gas Co. v. Traders & Ins. Co., 37 F. Supp. 119.

2a. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, . . . to be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (lack of jurisdiction over the subject matter), (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. Federal Rule 12 (b). The first five defenses are not available to the defendants in the present suit. Let us presume that the (6th) is. They have pleaded it in their first three motions filed (pages 112-113; 155-157; 195-197 Record). See citations hereunder.

3. Fed. R. 12 (f). Motion to Strike . . . the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading. The rule does not say: On a motion to strike the court may strike the cause at a glance on the motion. This would be the old demurrer and it is abolished by Fed. R. 7 (c). Kohloff, et al. v. Ford Motor Co., 27 F. Supp. 803.

4. Fed. R. 12 (g). If a party makes a motion under this rule and does not include therein all defenses and objec-

tions then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, . . . It follows that the Second Motion filed to the cases Nos. 728 and 2800 by counsel for the respondent Utah Fuel Company has been filed in violation of the provisions of the said federal rules.

5. Fed. Rule 12 (h). WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided . . . . and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. It follows that under the Rules of Civil Procedure the Court has power to dismiss a case only if it lacks jurisdiction over the subject matter and over the parties. Neither one of these grounds are present in the said two cases. For further argument on the subject see pages , Record, in which petitioner's Opposing Affidavits are set out.

6. The Bill on the equity side of the Court as filed is open to amendment if thought necessary. Monarch Anthracite Mining Co. v. Coffin (C.C.A. 3d C. 103 F. 2d 337, at page 339).

Defects of form; amendments. 28 U.S.C.A. Sec. 777.

6a. No summons, writ, declaration, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, . . . (R. S. Sec. 954).

7. Suits in equity cannot be sustained in the Courts of the United States in any case where a plain, adequate and complete remedy may be had at law. (28 U.S.C.A. 384.) (Judicial Code, Sec. 267.) (Mar. 3, 1911, ch. 231, Sec. 267, 36 Stat. 1163.)

8. Where a plain, adequate and complete remedy may be had at law. The Record of the cause and the cases cited at the caption present the answer. So long as the respondent Utah Fuel Company and its partners in conspiracy are free to buy dishonest lawyers as they have done so in the past and do continuously there can be no remedy at law at all. The Record presents a martyric cause in force and operation for the last twenty-seven years or more and now on Monday, November 1st, 1943, H. Collin Minton, Jr., as counsel for the respondent Utah Fuel Company, upon photostating and rephotostating their overt acts throughout the several States and the District of Columbia where they operated their conspiracy, and notwithstanding the Memorandum decision of Judge Thomas Glynn Walker (pages 17-22 of Bill, and pages , Record), entered against his first demurrer to the declaration in civil No. 728; the Decree of the Circuit Court of Appeals Third Circuit on Appeal No. 8027 (page , Record), and the proceedings had in ; and upon the offers he made in open Court to Judge Guy L. Fake (pages , Record), moved the Federal District Court for the district of New Jersey, the division at Newark, N. J., or Judge Guy L. Fake to whom he offered to pay the full amount involved if he would destroy the petitioner herein, for two Orders:

9. One Order dismissing the Complaints in the above entitled causes; and one Order directing the Clerk of the

United States District Court for the district of New Jersey to refuse to receive for filing any pleadings, documents or exhibits in causes now pending, or any future causes attempted to be instituted by Nicholas J. Curtis pro se (the petitioner herein); and on April 24, 1944, upon the directions of Judge Fake made in his Opinion (page , Record), filed an answer pleading the statute of limitations. For like reasons, it follows that there is no plain, adequate and complete remedy to be had at law. It further follows that, according to the practice of Judge Guy L. Fake, there is no remedy to be had at all. Will it be unreasonable to ask them to produce their Official Record and examine eye witnesses in order to establish the truth of the two Complaints? The Constitutional requirement of due process is not satisfied where a conviction is obtained by the presentation of testimony known to the prosecuting authorities of the state of Utah to be perjured (Amdt. 14.—Rights of Citizens, page 928, citing Mooney v. Holohan, 294 U. S. 103, 112.)

10. A State, through the action of its officers, may not contrive a conviction through the pretense of a trial which in truth is "but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured" (Brown v. Mississippi, 297 U. S. 278, 286); and this is what is going on now at Newark, N. J.

11. "The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions." Salinger v. United States, 272 U. S. 542, 548.

This right is also conferred by a statute of the United States (28 U.S.C.A. Sec. 636. Production of books and writings). In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery..... (R. S. Sec. 724.) In this case now before the Court the Motion Papers and Written Interrogatories are now pending for the last four years and the administration of justice is held by the throat.

Federal Rule 12 (b), Paragraph (6). Citations thereunder:

Leimer v. State Mut. Life Assur. Co. of Worcester, Mass., C.C.A. 8, 108 F. 2d 302;

L. Singer & Sons v. Union Pac. R. Co., C.C.A. 8, 109 F. 2d. 493;

Tahir Erk v. Glenn L. Martin Co., App. D. C., 116 F. 2d 865;

Asham v. Coleman, D. C. Pa., 25 F. Supp. 388;

Gay v. E. H. Moore, Inc., D. C. Okl., 26 F. Supp. 749;

Mahoney v. Bethlehem Engineering Corporation, D. C. N. Y., 27 F. Supp. 865;

Duarte v. Christie Scow Corporation, D. C. N. Y., 27 F. Supp. 894;

Shelaeff v. Groves, D. C. Cal., 27 F. Supp. 1018;

Sherover v. John Wanamaker, N. Y. D. C. N. Y., 29 F. Supp. 650;

Loughman v. Pitz, D. C. N. Y., 29 F. Supp. 882;

Banks v. King Features Syndicate, D. C. N. Y., 30 F. Supp. 352;

Westmoreland Asbestos Co. v. Johns-Manville Corporation, D. C. N. Y., 30 F. Supp. 389;
Duart Mfg. Co. v. Philad Co., D. C. Del., 30 F. Supp. 777;
C. F. Simonin's Sons v. American Can Co., D. C. Pa., 30 F. Supp. 901;
Dysart v. Remington Rand, Inc., D. C. Conn., 31 F. Supp. 293;
U. S. v. Edward Fay & Son, D. C. Pa., 31 F. Supp. 413;
Kadylak v. O'Brien, D. C. Pa., 32 F. Supp. 281;
Winkler v. New York Evening Journal, D. C. N. Y., 32 F. Supp. 810;
Smith v. Blackwell, D. C. S. C., 34 F. Supp. 989;
Eberle v. Sinclair Prairie Oil Co., D. C. Okl., 35 F. Supp. 296;
Vassardakis v. Parish, D. C. N. Y., 36 F. Supp. 1002;
Continental American Life Ins. Co. of Wilmington, Del. v. Fritsche, D. C. Pa., 37 F. Supp. 1;
Ripperger v. Schroder-Rockefeller & Co., D. C. N. Y., 37 F. Supp. 375;
Ellis v. Stevens, D. C. Mass., 37 F. Supp. 488;
Bramvir v. Cunard White Star Limited, D. C. N. Y., 37 F. Supp. 906;
Kellogg Co. v. National Biscuit Co., D. C. N. J., 38 F. Supp. 643;
Hadley v. Rinke, D. C. N. Y., 39 F. Supp. 207;
Baker v. Sisk, D. C. Okla., 1 F. R. D. 232;
Sheehan v. Municipal Light & Power Co., D. C. N. Y., 1 F. R. D. 363;
Southeastern Compress & Warehouse Co. v. Page, D. C. Ga., 1 F. R. D. 363.

Federal Rule 12 (f). MOTION TO STRIKE. • • • •

U. S. v. McCulloch, D. C. N. Y., 26 F. Supp.
Mendola v. Carborundum Co., D. C. N. Y., 26 F. Supp. 359;
Watts Electric & Manufacturing Co. v. United-Carr Fastener Corp., D. C. Mass., 27 F. Supp. 277;
Brinley v. Lewis, D. C. Pa., 27 F. Supp. 313;
Mahoney v. Bethlehem Engineering Corporation, D. C. N. Y., 27 F. Supp. 865;
National Millwork Corporation v. Preferred Mut. Fire Ins. Co. of Chenango County, D. C. N. Y., 28 F. Supp. 952;
Chambers v. Cameron, D. C. Ill., 29 F. Supp. 742;
Westmoreland Asbestos Co. v. Johns-Manville Corp., D. C. N. Y., 30 F. Supp. 389;
Alropa Corporation v. Heyn, D. C. Pa., 30 F. Supp. 668;
Radtke Patents Corporation v. C. J. Tagliabue Mfg. Co., D. C. N. Y., 31 F. Supp. 226;
U. S. v. Tedesco, D. C. N. Y., 31 F. Supp. 322;
U. S. v. Edward Fay & Son, D. C. Pa., 31 F. Supp. 413;
Teiger v. Stephan Oderwald, Inc., D. C. N. Y., 31 F. Supp. 626;
Schenley Distillers Corp. v. Renken, D. C. S. C., 34 F. Supp. 678;
Tatum v. Acadian Production Corp. of Louisiana, D. C. La., 35 F. Supp. 40;
Samuel Goldwyn v. United Artists Corp., D. C. N. Y., 35 F. Supp. 236;
Parks-Cramer Co. v. Mathews Cotton Mills, D. C. S. C., 36 F. Supp. 236;

Brockway Glass Co. v. Hartford-Empire Co., D. C. N. Y., 36 F. Supp. 470;
Sbicca-Del Mac, Inc. v. Milius Shoe Co., D. C. Mass., 36 F. Supp. 623;
Therfeld v. Postman's Fifth Ave. Corp., D. C. N. Y., 37 F. Supp. 958;
Kellogg Co. v. National Biscuit Co., D. C. N. J., 38 F. Supp. 643;
Shultz v. Manufacturers & Trades Trust Co., D. C. N. Y., 17 F. R. D. 53;
Myers v. Beckman, D. C. Okla., 1 F. R. D. 99;
Gilbert v. General Motors Corp., D. C. N. Y., 1 F. R. D. 101;
Reilly v. Wolcott, D. C. N. Y., 1 F. R. D. 103;
Mulloney v. Federal Reserve Bank of Boston, D. C. Mass., 1 F. R. D. 153;
Meek v. Miller, D. C. Pa., 1 F. R. D. 162;
Michelson v. Shell Union Oil Corp., D. C. Mass., 1 F. R. D. 183;
O'Leary v. Liggett Drug Co., D. C. Ohio, 1 F. R. D. 272;
Courteau v. Interlake S. S. Col., D. C. Mich., 1 F. R. D. 429;
Haddock v. Springfield Yellow Cab Co., D. C. Ohio, 1 F. R. D. 504;
French v. French Paper Co., D. C. Mich., 1 F. R. D. 531;

Numerous other cases hereunder. See p. 721, Vol. 72, F. D.

FEDERAL RULE 12 (h). WAIVER OF DEFENSES.

Doyle v. Loring, C.C.A. 6, 107 F. 2d 337;
State of Missouri, ex rel. and to Use of De Vault v. Fidelity Casualty Co. of New York, C.C.A. 8, 107 F. 2d 343;
Nakdimen v. Baker, C.C.A. 8, 111 F. 2d 778;
Vilter Mfg. Co. v. Rolaff, C.C.A. 8, 110 F. 2d 491;
Person v. U. S., C.C.A. 8, 112 F. 2d 1;
Puente v. Spanish Nat. State, C.C.A. 2, 116 F. 2d 43;
Central Mexico Light & Power Co. v. Munch, C. C.A. 2, 116 F. 2d 85;
Hackner v. Guaranty Trust Co. of New York, C. C.A. 2, 117 F. 2d 95;
Wheeler v. Lientz, D. C. Mo., 25 F. Supp. 939;
Mills v. Lowndes, D. C. Md., 26 F. Supp. 792;
Duarte v. Christie Scow Corp., D. C. N. Y., 27 F. Supp. 318;
Devine v. Griffenhagen, D. C. Conn., 31 F. Supp. 624;
Piest v. Tide Water Oil Co., D. C. N. Y., 27 F. Supp. 1921;
Dysart v. Remington Rand, D. C. Conn., 31 F. Supp. 296;
Murphy v. Puget Sound Mortgage Co., D. C., Wash., 31 F. Supp. 318;
Devine v. Griffenhagen, D. C. Conn., 31 F. Supp. 624;
Zwerling v. New York & Cuba Mail S. S. Co., D. C. N. Y., 33 F. Supp. 721;
Equitable Life Assur. Soc. of U. S. v. Saftlas, D. C. Pa., 35 F. Supp. 62.

12. CH. X.

X. Whether Judge Guy L. Fake did not deprive the district court of its jurisdiction when he called before him H. Collin Minton, Jr., Counsel pro se, Utah Fuel Company, et als., and in open Court conspired with him and ordered and directed him to proceed and file his second motion to dismiss and for injunction and to destroy the plaintiff and his cause notwithstanding the previous decisions of that 1. District Court; 2. Circuit Court of Appeals; and 3. This Court.

REASON X.

The plain purpose of the statute (Judicial Code, Section 21) was to afford a method of relief through which a party to a suit may avoid trial before a judge having a personal bias or prejudice against him or in favor of the opposite party. Price v. Johnson, 125 F. ed. 806. There can be no stronger statements made by a judge to a party in a civil action before him than those which Judge Guy L. Fake and counsel for the respondent made. The judge to declare: He must die here in poverty a martyric death! Make the Motion and watch it to come up before me; and counsel for the defendants to make offers. We will pay to your honor the full amount involved if you destroy him (Pages 267-270, Record; and pages 2a-11a of Brief, to C.C.A. 3d C.; and again on pages 9-10 of same Brief.)

2. There is no judge on the face of the earth to sit down and write an Opinion the first three paragraphs to be based upon his own ill will or malice and to dismiss the affidavit

setting forth the conspiracy between himself and counsel for the defendants.

3. The bodies of motions or the copies thereof served upon your petitioner herein are set out correctly under Ch. Ea. See also the Record, pages 5, 6, 7, is the motion by H. Collin Minton, Jr., Utah Fuel Co., et als.; 45, 46, ½ of 47 is the motion of Rosenkrans, et als.; 83, 84, 85, ½ of 86 is the motion of Carol C. Johnson. As to Motions addressed to Civil No. 2800, see pages , Record.

4. Falsify (Title 18, U.S.C.A., Sec. 235). To disprove; to prove to be false or erroneous; to avoid or defeat; spoken of verdicts, appeals, etc., Co. Litt. 1040.

5. To counterfeit or forge; to make something false; to give a false appearance to any thing; as to falsify a record or document. Black's L. Dictionary, 3rd Ed.; Citing: Pou v. Ellis, 66 Fla. 358, 63 So. 721, 722, and, Pull. Acts., 162; 1 Story, Eq. Jur., Sec. 525. See Shores-Mueller Co. v. Bell, 21 Ga. App. 194, 94 S. E. 83, 84; Falsification.

6. The alteration or making false of a record is punishable at common law or by statute in the states, and, if of records of the United States courts, by Act of Congress of the United States of April 30, 1870; U. S. R. S., Sec. 5394. Bouvier L. D.

Whoever, having the custody of any record, proceeding, map, book, document, paper, or other thing specified in Section 234 of this title, shall willfully and unlawfully conceal, remove, mutilate, obliterate, falsify, or destroy any such record, proceeding, map, book, document, paper, or thing, shall be fined not more than $2,000, or imprisoned not more than three years or both; and shall moreover for-

feit his office and be forever afterward disqualified from holding any office under the Government of the United States. Title 18, U.S.C.A., Sec. 235 (Mar. 4, 1909, Ch. 321, Sec. 129, 35 Stat. 1112).

7. It would seem that the provisions of the statute quoted above is sufficient to disqualify Judge Guy L. Fake from proceeding any further with the cause of the petitioner herein and pretenses to the contrary notwithstanding. See Ch. (Y. Z.) hereunder.

13. CH. Y. Z.

Y. Whether paragraphs 1, 2, and 3 of the Opinion of Judge Guy L. Fake are supported by the basic grounds set forth in the first three motions filed in Civil No. 2800. Or

Z. Whether these said paragraphs are the judge's malicious imaginations based upon the fourth and only motion which he directed to be made and presented to him and to be watched to come up before him "because no other judge will hear you" for and in consideration of the sums offered to him by said counsel in open court (the amount involved).

REASONS (Y. Z.)

The first three paragraphs of said Opinion read as follows: Motions are made to dismiss the complaints herein on two basic grounds:

First, it is alleged that the two documents filed as complaints fail to disclose valid claims;

Second, that plaintiff is an incompetent person and therefore has no right to sue in the absence of a guardian.

Whereas the motion of counsel for the defendants, Utah Fuel Company, et als. (pages 112-113 Record), set forth as follows:

1. The complaint contains unnecessary repetition, prolixity, scandal, impertinence, obscurity and uncertainty, and other violations of the rules of pleading.

2. That the matters complained of are now before the Supreme Court of the United States on petition for a Writ of Certiorari filed by complainant herein, in which cause issue was joined by the defendants herein, which injunction inter alias would prevent these defendants from contesting the said application to the Supreme Court of the United States. Respectfully (etc.); and the Motion of William V. Rosenkrans set forth as follows:

1. Because the bill of complaint lacks certainty and is not so framed as to reasonably appraise these moving defendants of the elements of the case to be made against them. 2. Because the bill of complaint so far as these moving defendants are concerned, discloses no cause of action and sets forth no grounds for equitable relief against these defendants, or either of them. 3. Because the bill of complaint seeks to enjoin these defendants and each of them from carrying on a conspiracy against complainant without alleging, so far as these defendants are concerned, any specific acts of conspiracy, at all. 4. Because the bill of complaint (see Paragraph #4 of the prayer, page 38), prays to enjoin "the defendants, their officers and agents, procurers *and each of them,* from prosecuting and carrying on the conspiracy set forth in the several Counts of the complaint of the said action at law #728" (said ac-

tion at law #728 being set forth at length in Paragraph 1 of the bill of complaint, page 3, and referred to throughout the bill.) Whereas, said bill of complaint shows upon the face of it that the complaint in said action at law #728, so far as these defendants and their clients are concerned, was struck and the service of the summons thereon quashed (see Paragraph 1) of bill of complaint under captions #1 and ruling, page 18). 5. Because so far as these defendants are concerned, the bill of complaint is utterly without foundation—in paragraph #1 of the bill of complaint, it is alleged that the bill is filed as ancillary and auxiliary and dependent upon an action for conspiracy commenced in this court on the law side and designated as case #728, and on page 18 of the bill of complaint, it sets forth that said action at law so far as these defendants and their clients are concerned was dismissed and an order granted quashing the summons therein. The alleged suit #728 for conspiracy having been dismissed so far as these defendants and their clients are concerned, this bill of complaint dependent upon said action at law is without status, and cannot be used as a subterfuge to circumvent the said order of the United States District Court striking the complaint and quashing the service of summons. Dated: April 15th, 1943. William V. Rosenkrans, Pro Se and as attorney.... And the Motion of Louis Antonopoulos and George Lavdas set forth as follows: (Caption and Notice.)

1. Because the complaint lacks certainty and is not so framed as to reasonably apprise defendants of any facts or elements of the case to be made against them. 2. Because the allegations of the Complaint are so vague, indefinite, incoherent and unrelated it is impossible to frame an answer thereto. 3. Because the Complaint does not set forth any factual basis or facts to warrant the issuance of

the writ. 4. Because the Complaint does not set forth a cause of action. 5. Because the Complaint does not sufficiently set forth or inform defendants of any facts or acts on the part of these defendants. 6. Because the Complaint herein for Writ of Injunction is apparently based upon the acts or facts or allegations complained of by this plaintiff in a certain action at law No. 728, in which these defendants were not parties defendant. Respectfully. Geo. A. Cella, Attorney (etc.) Dated: March 24, 1943. These are the three motions filed to the Bill in Equity. As to the Declaration in Civil No. 728, see above.

14. CH. Za. Zb.

Za. Whether the Companion Case Rule applies to and governs the suit on the Equity side of the Court for injunction and makes the Counts sustained by the rulings of Judge Thomas Glynn Walker applicable to the suit in equity.

Zb. Whether the bill as filed on the equity side of the Court is open to amendment if thought necessary.

REASONS (Za. Zb.)

1. The decision of Judge Thomas G. Walker in Civil No. 728 (pages , Record), is controlling as the law of the case or at least as authority in its companion case No. 2800, which is involving the same subject matter and is between the same parties. Citations set forth under Reason S. are repeated here. See also page 61 of Brief to C. C.A. 3rd C.; and pages 53-54-55 of same Brief.

2. The argument and authorities set forth under Ch. (N. O.), supra, are repeated here with like force and effect as if the said chapter was set forth herein. The said chapter is set forth in the Appendix, pages , of this Petition.

15. CH. Aa.

Whether the Utah Fuel Company's Motion for injunction and the Exhibits attached thereto, gathered from the States of Utah, New Jersey and New York and the District of Columbia, whereat overt acts in furtherance of the object of the conspiracy were committed, constitue adoption or ratification of every wrong committed in furtherance of the object of the conspiracy. (Cooley on Torts, Sec. 76.)

REASON (Aa.)

The batch of exhibits, together with the motion for injunction against the petitioner herein and plaintiff in the district court, obtained, photostated and compiled with full knowledge of the fact that they were perjured which perjuries were done in the interest of the respondent, Utah Fuel Company, to-wit: He (this petitioner) filed suit against Utah Fuel Company. See the deceptive and mobish proceedings had in the District Court of Salt Lake County, Utah, and Supreme Court of D. C.), and were intended to further the purpose of its conspiracy. It will be helpful here to state that the first arrest was made for refusing to drop the said suit against the above named respondent and all the deceptive and mobish trials had there-

on were based on the ground that the petitioner filed suit against it. See the photostated Record which includes the Complaint as filed in the United States District Court for the District of Utah. All those matters set forth in the exhibits were of record when Judge Walker handed down his Memorandum Opinion on November 19, 1931. A motion will be made to Judge Phillip Forman of the court below, here in Trenton, praying for an Order directing the transmission to the Court here all exhibits on file and record in the District Court. See also those filed with the Clerk of the C.C.A. 3rd C., which are parts of the Record on Appeals Nos. 8027 and 8664.

"That an act for another by a person not assuming to act for himself but such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him is the known and well established rule of Law. Cooley on Torts, Sec. 76, hereunder.

Cooley on Torts, Sec. 47.

COOLEY ON TORTS, 4th Ed., Sec. 47.

Some torts are in their nature joint torts, because the action of several is required to accomplish them. . . . Cooley on Torts, Sec. 74. Conspiracy. Such a case would be a conspiracy to ruin one in his reputation, or to defraud him of his property; originating in combination, and carried out by joint action, or at least in pursuance of the joint arrangement and understanding. 6 Saunders v. Freeman, Pl. Com. 209; Burton v. Fulton, 49 Pa. St. 151; Hutchins v. Hutchins, 7 Mill (N. Y.), 194; s. c., Bigelow, Lead. Cas. on Torts, 207; Brannock v. Bouldin, 26 N. C. (41 red.) 61; Wildee v. McKee, 111 Pa. St. 335, 2 Atl. 108,

56 Am. Rep. 271. The text approved, Buckley v. Mulvile, 102 Iowa 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479. Where several persons conspire to unlawfully injure another, they are jointly and severally liable for such injury. Wilson v. Davis, 138 Ark. 111, 211 S. W. 152; Revert v. Hesse, 184 Cal. 295, 193 Pac. 943; Smith v. Manning, 155 Ga. 209, 116 S. E. 813; Leech v. Farmers' Tobacco Warehouse Co., 171 Ky. 791, 188 S. W. 886.

The general rule is, that a conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy, would give a right of action. Note 7, citing numerous cases. The damages is the gist of the action, not the conspiracy; 8. Note 8, citing numerous cases. . . .

Sec. 75. What Constitutes Participation? Most wrongs may be committed either by one person or by several. When several participate, they may do so in different ways, at different times, and in very unequal proportions.

Sec. 76. Adoption or Ratification of a Wrong. In order to constitute one a wrongdoer by ratification, the original act must have been done in his interest, or been intended to further some purpose of his own. Lord Coke on this subject, says: "He that agreeth to a trespass after it is done is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment." 31 (citing numerous cases). Chief Justice Tindall presents the same principle more fully, in the following language: "That an act for another by a person not assuming to act for himself but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well estab-

lished rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences that follow from, the same act done by his previous authority. Such was precisely the distinction taken in the Year Book, 7 Hen. 4, Fo. 35—The ratification should also be with full knowledge of the acts, or with the purpose of the party, without inquiry, to take the consequences upon himself. 32 Myers v. Shipley, 140 Md. 380; 116 Atl. 645 20 A. L. R. 1460; Williams v. Cape Fear Lumber Co., 172 N. C. 299, 90 S. El. 254; Frick Reid Supply Co. v. Hunter, 47 Okla. 151, 148 Pac. 83; Lewis v. Read, 13 M. & W. 834; Adams v. Freeman, 9 Johns (N. Y. P. 117); Dally v. Young, 3 Ill. App. 39.

Sec. 81. Liability for Intentional Injury. Where several persons unite in an act which constitute a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly charge them with intending the consequences which follow, it is a very reasonable and just rule of law which compels each to assume and bear the responsibility of the misconduct of all 66. Miller v. Fenton, 11 Paige (N. Y.) 18; Nelson v. Cook, 17 Ill. 443; Turner v. Hitcock, 20 Iowa 310; McMannus v. Lee, 43 Mo. 206, 97 Am. Dec. 386; Wallace v. Miller, 15 La. Ann. 449; Lewis v. Johns, 34 Cal. 629; Shepherd v. McQuilkin, 2 W. Va. 90; Woodbridge v. Conner, 49 Me. 353, 77 Am. Dec. 263; Brown v. Perkins, 1 Allen (Mass.) 89; Barden v. Felch, 109 Mass. 154; Johnson v. Barber, 10 Ill. (5Gilm.) 425, 50 Am. Dec. 416; Clay v. Waters, 161 Fed. 815, citing Cooley on Torts, 3d Ed.; Selby v. Lindstrom, 59 Okla. 227, 158 Pac. 1127.

Sec. 85. What Constitutes a Joint Wrong or Joint Liability. All who actively participate in any manner in the commission of a tort, or who command, direct, advise, encourage, aid or abet its commission, are jointly and severally liable therefor. 27 (Numerous citations cited hereunder.) (15 C. J. S.), p. 994. 1. Civil Liability. Secs. 1-33, p. 993. Sec. 1. Nature and Elements. A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose. (There are over a page of citations cited hereunder.)

Time to sue and limitations. Sec. 22, "is not subject to a limitation which control as another form of action." Note 10, N. J., Van Horn v. Van Horn, 28 A. 669, 56 N.J.L. 318.

16. CH. Ba. Ba. b.; Ba. C.; Ba. d.

Ba. Whether the fact that the petitioner herein gave unto the defendant, Utah Fuel Company, his resignation of his compulsory assumption of the office or job of interpreter, legal local agent with "jurisdiction" over all cases between employer and employees, and refused to reassume or resume it when he was ordered by the officials of said defendant company, constitutes the said defendant's motive or reason for instituting the conspiracy set forth in the Record of the cause to destroy the petitioner herein and its former legal local agent at Clear Creek, Utah.

Ba. b. Whether the defendant Utah Fuel Company and its contract doctors were motivated to refuse to the brother of this petitioner hospitalization; the needed medical treatment and operation; pronounce him tubercular and incurable; and to put him out of its General Hospital

thereby forcing the petitioner herein to remove his brother to private hospital and to bear all expenses of medical treatment and operation, hospitalization, and convalescent means to restore him to his normal health because of the petitioner's unwillingness to bear his share of the brunt of the said defendant's operations.

Ba. c. MOTIVE.—Whether the fact that the defendant Utah Fuel Company and its contract doctors refused hospitalization to the brother of this petitioner, refused the needed medical treatment and operation, pronounced him tubercular and incurable and put him out of its general hospital to die a martyric death is the motive, cause or reason for carrying on the conspiracy at any cost? And

Ba. d. Whether it presumed to, intended, and to intend, the natural and probable consequences of its acts, including the duration of the conspiracy.

REASONS (Ba. Bb. Bc. Bd.)

1. The conspiracy originated when this petitioner gave up his job as interpreter with the respondent, Utah Fuel Company. Thereafter he was forced to mine coal out of stumbs where in rock roof from one foot and over in thickness was coming down from bounces of cave in all around. There were no suitable timber furnished to prop up the roof and death was hanging on all six miners working thereunder. Petitioner had become an expert in this line of work and held it for years. There were no way out because the mine foreman and the mine superintendent visited the death trap and pointed out the dangers but refused to order the endangered miners out of danger and

refused to check the Japs who were behind causing the danger; and refused to pay for the work removing the rock which cracked from the roof and mingled with the coal. Thus the petitioner was forced to give up his employment with said respondent-company. Two years thereafter, with the aid of one Mr. Skliris, interpreter general, he was re-employed by said respondent as miner but he was taken and assigned a driver's job in a rock tunnel which was then driven because they could not get any one to handle the job as it should be handled. This job was as dangerous as the one stated above and more so but it paid. He was returned to stumps after the tunnel was just about through and held the job up to the year 1918. When his brother was stricken with sickness he was assigned the job of a nurse over him in his home, No. 144 Clear Creek, Utah, and for forty days he had to play nurse to save his brother. Your petitioner herein was then studying two courses in Law, one with the LaSalle Extension University, Chicago, Ill., and one with the Agriculture College of the State of Utah, Logan, Utah, and the officials of said respondent were uneasy less they be exposed in their operations. There is no room for doubt but that the said respondent and its officials were motivated by the fear of the consequences of their operations and treatments of their miners that moved them to do away with your petitioner herein, and after so many years here they are at it just as they were in the beginning, when they originated the plot to do away with your petitioner at any price. See the hundreds of cases against it quoted in the Appendix of the Declaration and the Reports of the Industrial Commission of Utah and those of the Courts of the State of Utah. There are more cases against it than any other person or corporation doing business in the State of Utah.

2. EVIDENCE. key 64. Intent. One is presumed to intend the natural and probable consequence of his acts. C.C.A. Ga., 1926. Lovett v. Faircloth, 10 F. 2d 301, certiorari denied, Faircloth v. Lovett, 46 S. Ct. 355, 270 U. S. 659, 70 L. Ed. 785; C.C.A. Mo., 1926. Houchin Sales Co. v. Angert, 11 F. 2d 115; D. C. N. Y., 1932. In re Wernecke, 1 F. Supp. 127, (1) It means that the conspiracy was made with the intent to injure, because the law presumes that one intends the ordinary results of his acts.

3. A person is presumed to intend the natural consequences of his acts. C.C.A. S.C., 1918. Navassa Guano Co. v. Cookfield, 253 F. 883, 165 C.C.A. 363.

4. U. S. Wis. 1872. The law authorizes the presumption that a person of ordinary intelligence intends what is the necessary and unavoidable consequence of his acts. Wager v. Hall, 83 U. S. 584, 16 Wall, 581, 21 L. Ed. 504, affirming Hall v. Wager, Fed. Cas. No. 5, 951, 3 Biss. 28, 5 West. Jur. 538, 5 N. B. R. Chi. Leg. N. 401.

5. MOTIVE. "A motive is some cause or reason that moves the will and induces action". In re Eaves. 30 F. 21, 26.

6. "In sense of the criminal law, 'motive' has been well enough defined as that which leads or tempts the mind to indulge in a criminal act, and it is something that may be resorted to as a legitimate help in arriving at the ultimate act in question." Thompson v. United States, 144 F. 14.

7. Motive is an inducement, or that which leads or tempts the mind to indulge a criminal act. People v. Fitzgerald, 50 N. E. 846, 847, 156 N. Y. 258.

8. Motive is the inducement, reason, cause, or incentive for the doing of an act. Bates v. Commonwealth, 225 S. W. 1085, 1091, 189 Ky. 727.

Motive. Is the inducement, cause or reason why a thing is done. Black's Law Dictionary. Citing: Chatfield v. Wilson, 5 Am. Law Reg. (O. S.) 528.

17. CH. Ca., Da.

Whether the plaintiff in the district court, appellant in the C.C.A. 3rd C. and petitioner here have had timely appealed from the Opinion and Orders signed and entered thereon, the Judgment of the District Court?

Da. Whether the appellant on appeal to the Circuit Court of Appeals Third Circuit fully and truly presented the issues in the cause to the said Court; and whether the said Circuit Court failed and neglected to adjudicate the issues so presented notwithstanding the fact that the appellees and their counsels failed to appear and argue their defense?

REASON (Ca, Da). The appeal to the Circuit Court of Appeals Third Circuit was timely taken. See page 6, 2d paragraph. of Brief to said Court. Also the Docket Entries (page , Record, Da).

The issues in the cause on appeal to the said circuit court were duly presented by the petitioner but, notwithstanding the fact that no counsel appeared to argue the defense of the appellees, the said Court failed to consider

and decide any of them. For that reason the Brief as filed on said Appeal will be presented to this Court as an exhibit for whatever inference the Court may be able to derive from the same thereof. Hughe's Federal Practice, Section 6235, and the cases cited therein. Your petitioner deems this said Brief important to his cause and for that reason he would present copies of the same. It sets forth cases similar in point of law and fact but the court of appeals failed to try the appeal.

18. CH. Ea.

Ea. Whether there is a conflict of decisions in the district court between the decision of Judge Thomas Glynn Walker and that of Judge Guy L. Fake in the same cause on the same facts, pleadings and Exhibits?

REASON (Ea).

1. There is a conflict of decisions in the district court between the decison of Judge Thomas Glynn Walker and that of Judge Guy L. Fake in the same cause, on the same facts, pleadings and exhibits, and parties. The decision of Judge Walker on motion No. 4 is entirely based upon the grounds more particularly set forth in the Notice of Motion and Motion Addressed to the several Counts set forth in said Motion, to wit: (Caption and Notice.)

1. In the first count the plaintiff fails to allege any facts tending to show an obligation on the part of the defendant, The Utah Fuel Company, to reimburse the plaintiff for the alleged expenditures by the plaintiff for the benefit

of another, or of any agreement or undertaking on the part of the defendant company so to do. Nor is Exhibit "A" referred to therein evidence of any such alleged obligation. Plaintiff relies upon the allegations of Paragraph 3 to 13 as a basis for establishing the obligation alleged in the first count. While the said paragraphs may allege an agreement between the defendant company and a third person, there is no allegation therein contained of any expressed or implied agreement on the part of the defendant company to reimburse plaintiff for alleged voluntary expenditures by plaintiff for the benefit of said third person. 2. In the second count the plaintiff fails to allege any facts which would disclose a cause of action against the defendant-company and its agents or associates, and the allegations of paragraphs 36 to 39 therein referred to set forth facts that are totally disconnected with the activities of the company defendant and its agents and associates. The second count contains vague, indefinite and unrelated allegations, and is made up of accusations and conclusions of law totally unsupported by alleged facts. 3. In the seventh count the plaintiff fails to allege any facts which would constitute grounds for a cause of action against the defendant-company and its agents, and it is otherwise indefinite, uncertain, scandalous and bad for duplicity, and is made up of accusations and conclusions of law totally unsupported by alleged facts.

4. In the eighth, ninth and tenth counts plaintiff fails to allege any actions of the therein named defendants which are in any way attributable to the defendant-company and its agents and associates, and hence the allegations of activities on the part of the therein mentioned defendants which took place more than twenty years ago are totally unrelated to any alleged acts of the defendant-com-

pany. In addition there is contained in the tenth count scandalous charges against an officer of the United States Courts. 5. In the eleventh, twelfth, thirteenth and fourteenth counts plaintiff makes scandalous accusations of alleged misconduct on the part of the defendant-company and its agents and associates,—which wrongful acts, it is alleged took place more than twenty years before and were committed with the purpose of preventing plaintiff from prosecuting an alleged cause of action against the defendant-company. There are, however, no facts alleged which would tend to establish the claim that plaintiff had cause to institute suit against defendant-company and indeed, the plaintiff's allegations clearly defeat the contention that he has or ever had a cause of action against defendant-company. 6. The fifteenth, sixteenth and seventeenth counts contain nothing more than a number of unrelated, irrelevant and scandalous charges against several named defendants who are in no way alleged to have acted as agents or associates of said defendant-company, or to have had any connection with said defendant-company. 7. The eighteenth, nineteenth and twentieth counts contain further unrelated, irrelevant and scandalous charges involving alleged acts performed approximately eighteen years ago by persons whose connection with defendant-company is not stated. Furthermore it is alleged that such remote and unrelated acts were done for the purpose of preventing plaintiff from prosecuting an alleged cause of action which is shown on the face of the complaint never to have existed in the plaintiff's favor. 8. The twenty-third and twenty-fourth counts contain scandalous charges that the defendant-company conspired with petitioner herein to maliciously renew and re-open the alleged persecution of the plaintiff,—although it appears from the allegations of the plaintiff that petitioner

herein appeared in behalf of defendant company in answer to a complaint filed by said plaintiff against said company-defendant.

9. The twenty-fourth count also contains unrelated and scandalous allegations concerning the Courts and officials of the United States.

10. The twenty-fifth count contains only a narrative of facts which are unrelated, irrelevant, immaterial and scandalous, and contains no allegation of probable cause.

AND FURTHER TAKE NOTICE that at said time and place we will move for an order striking the said complaint and all counts therein upon the ground that said document contains unrelated and scandalous allegations concerning the Courts and officials of the United States of America and the State of Utah, and should not be allowed to remain among the records of this Court.

Respectfully,
Minton & Rogers,
Attorneys for Defendants.
The Utah Fuel Company and
H. Collin Minton, Jr.

SPECIAL APPEARANCE & NOTICE.

TAKE NOTICE, That I hereby enter a Special Appearance on behalf of the defendants Dr. Frederick Dunn, Dr. A. C. Callister, Dr. E. D. Smith, Charles E. Maybe, (Charles R. Mabey), and W. D. Sutton; and that on Friday, May 3, 1940, at 10:30 o'clock in the forenoon, (D.S.T.), or as soon thereafter as counsel may be heard,

in the United States District Court rooms, Post Office Building, Trenton, N. J., I will move to quash service of the subpoenae made upon the above named defendants.

Respectfully,

Minton & Rogers,

Attys. for above named def'ts

by special appearance.

2. There here in the above motion is the answer of the deception of the Opinion of Judge Guy L. Fake (page , Record). As to the argument against the decision of Judge Fake the matters set forth in Reasons (Y.Z.) are repeated here with like force and effect as if those said matters were set forth herein and under, because your petitioner feels sorry to say that he fears that his petition for writ of certiorari may be thought to be too long, but this is a matter of self-defense and has to be.

3. The said demurrer (or motion) came on to be heard and argued before Judge Thomas G. Walker and the date set therein. The moving defendants were represented in court by H. Collin Minton, Jr., who answered his turn and call of his Motion for Demurrer and made a short argument. Further on this see the Stenographic Transcript of the hearing it is to be found in the exhibits which are to be sent up by the Clerk of the Circuit Court of Appeals Third Circuit. Said counsel was given every opportunity to present his defense, if he had any. Your petitioner herein submitted his part of the argument on his Opposing Affidavit which see (pages 8 to 44 inclusive of the Record). Thereafter and on the 19th day of November, 1941, Judge Walker handed down and entered his Memorandum Opinion on all the four-five motions then pending before him. Motion No. 1 was argued by Wil-

liam V. Rosenkrans and Motion No. 3 was not argued but a letter had been written to the Court submitting the motion and the affidavit attached thereto.

4. Under Civil Procedure Rule relating to findings by Court the formal findings of fact and conclusions of law separately stated by Judge Walker take place of Opinion written by the Court on the facts and law present in the cause. Roberts, S. Ct. J. in Mayo v. Lakeland Highlands Canning Co., 309 U. S. 521, 60 S. Ct. 521, and cases cited. The Argument or part of the decision is to be found under reasons (J.K.L.M.) and the same is repeated here. The findings of Judge Walker were obviously necessary to the intelligent and orderly presentation and proper disposition of the appeals had in this cause and constitute the cause res judicata or the law of the case. The argument and cases cited under reasons (N.) are repeated here. To the same effect and with like force the parts of the decision of this Court in Mayo v. Lakelands (etc.) supra. set out under reasons (J.K.L.M.).

To the same effect and with like force the:

LAW OF THE CASE, 72 FD, pp. 15, 16, 17.

Sibald v. United States, Fla., 37 U. S. 488, 12 Pet. 488, 9 L. Ed. 1167;

Galpin v. Page, Cal., 85 U. S. 350, 18 Wall. 350, 21 L. Ed. 959;

Messinger v. Anderson, Ohio, 32 S. Ct. 739, 740, 225 U. S. 436, 56 L. Ed. 1152;

Standard Sewing Mach. Co. v. Leslie, Ill., 118 F. 557, 559, 55 C.C.A. 323;

The Dredge A., D.C.N.C., 217 F. 617, 622;

Pennsylvania Mining Co. v. United Mine Workers of America, C.C.A. Ark., 28 F. 2d 851, 853, 855;
Illinois Cent. R. Co. v. Crail, C.C.A. Minn., 31 F. 2d 111;
Walker v. Taylor Engineering & Mfg. Co., C.C.A. Okl., 34 F. 2d 748, 749;
National Brake & Electric Co. v. Christensen, C.C.A. Wis., 38 F. 2d 721, 722;
Triborough Chemical Corporation v. Doran, D. C. N. Y., 39 F. 2d 479, 480;
International Brotherhood of Electrical Workers, Local No. 134, v. Western Union Telegraph Co., C.C.A. Ill., 46 F. 2d 736, 737;
Page v. Arkansas Natural Gas Corporation, C.C.A. Ark., 53 F. 2d 27, 31;
Aetna Life Ins. Co. v. Wharton, C.C.A. Ark., 63 F. 2d 378, 379;
American Surety Co. of New York v. Bankers Savings & Loan Ass'n of Omaha, Neb., C.C.A. Neb., 67 F. 2d 803, 805;
Seagraves v. Wallace, C.C.A. Tex., 69 F. 2d 163, 164;
Claiborne-Reno Co. v. E. I. Du Pont de Nemours & Co., C.C.A. Iowa, 77 F. 2d 565, 566, 567;
Miller v. Travelers Ins. Co. of Hartford, Conn., C.C.A. Ill., 80 F. 2d 503, 504;
New York Life Ins. Co. v. Stone, C.C.A. Mass., 80 F. 2d 614, 616;
De Parcq v. Liggett & Myers Tobacco Co., C.C.A. Minn., 81 F. 2d 777, 779;
Hunt v. Commissioner of Internal Revenue, C.C.A. 582 F. 2d 668, 670;
United States v. Hossmann, C.C.A. Mo., 84 F. 2d 808, 810;

Carpenter v. Durell, C.C.A. Tenn., 90 F. 2d 57, 58.
Lauf v. E. G. Shinner & Co., C.C.A. Wis., 60 F. 2d 250;
In re G. W. Giannini, Inc., C.C.A.N.U., 90 F. 2d 445, 448, 111 A.L.R. 1492;
Page v. Regents of University System of Georgia, C.C.A. Ga. 93 F. 2d 887, 889;
New York Life Ins. Co. v. Golightyly, C.C.A. Ark., 94 F. 2d 316, 319;
City of Orlando v. Murphy, C.C.A. Fla., 94 F. 2d 426, 429;
State of Kansas ex rel. Beck v. Occidental Life Ins. Co., 95 F. 2d 935, 936;
Davis v. Davis, 96 F. 2d 512, 516, 68 App. D. C. 240;
Thompson v. Park Sav. Bank, 96 F. 2d 544, 547, 68 App. D. C. 272;
Deppe v. General Motors Corporation, C.C.A. N. J., 98 F. 2d 813, 815;
Millers' Mut. Fire Ins. Ass'n of Illinois v. Bell, C.C.A. Minn., 99 F. 289, 292;
Reynolds Spring Co. v. L. A. Young Industries, C.C.A. Mich., 100 F. 2d 257;
Chicago, St. P., M. & O. Ry. Co. v. Kulp, C.C.A. Minn., 102 F. 2d 352, 354;
Cummings v. Harbee, 102 F. 2d 622, 625, 70 App. D. C. 18;
Munro v. Post, C.C.A. N. Y., 102 F. 2d 696, 688;
South Florida Securities, Inc. v. Seward, C.C.A. Fla., 103 F. 2d 872, 873;
Golden West Brewing Co. v. Milonas & Sons, C.C.A. Cal., 104 F. 2d 880, 881;
Nielsson v. Utah Const. Co., C.C.A. Idaho, 104 F. 2d 887, 892;

Johnson v. Commissioner of Internal Revenue, C.C.A. 8, 105 F. 2d 454, 456;
New York Life Ins. Co. v. Gamer, C.C.A. Mont., 106 F. 2d 375, 376;
Fidelity & Deposit Co. of Maryland v. Port of Seattle, C.C.A. Wash., 106 F. 2d 777;
Pike Rapids Power Co. v. Minneapolis, St. P. & S.S.M. Ry. Co., C.C.A. Minn., 106 F. 2d 891, 894;
F. W. Woolworth Co. v. Carriker, C.C.A. Mo., 107 F. 2d 689, 692;
Leader v. Apex Hosiery Co., C.C.A. Pa. 108 F. 2d 71, 81;
Fidelity & Guaranty Fire Corporation of Baltimore, Md., v. Bilquist, C.C.A. Wash., 108 F. 2d 713;
Atchison, T. & S. F. Ry. Co. v. Ballard, C.C.A. Tex., 108 F. 2d 768, 772;
Acker v. Herfurth, Jr., Inc., 110 F. 2d 241, 244, 71 App. D. 241;
Marcalus Mfg. Co. v. Automatic Paper Mach. Co., C.C.A. N. J., 110 F. 2d 304;
Cochran v. M. & M. Transp. Co., C.C.A. R. I., 110 F. 2d 519, 521;
Connett v. City of Jerseyville, C.C.A. Ill., 110 F. 2d 1015, 1018;
Von's Inv. Co. v. Commissioner of Internal Revenue, C.C.A. 9, 111 F. 2d 440;
Kurn v. Stanfield, C.C.A. Mo., 11 F. 2d 469, 474;
Guardian Life Ins. Co. of America v. Kissner, C.C.A. Mo., 111 F. 2d 532;
Sartor v. Arkansas Natural Gas Corporation, C.C.A. La., 111 F. 2d 772;
Fidelity & Deposit Co. of Maryland v. Helvering, 112 F. 2d 205, 207;

Gosney v. Metropolitan Life Ins. Co., C.C.A. Mo., 114 F. 2d 649, 651;

Aetna Life Ins. Co. v. McAdoo, C.C.A. Ark., 115 F. 2d 369, 370;

Midland Vallet R. Co. v. Jones, C.C.A. Okl., 115 F. 2d 508, 509;

White v. Higgins, C.C.A. Mass., 116 F. 2d 312, 317, 318;

Sonega Coke & Coal Co. v. Price, C.C.A. W. Va., 116 F. 2d 618, 621;

A. S. Kreider Co. v. United States, C.C.A. Pa., 117 F. 2d 133, 135;

Citizens Nat. Bank of Waco v. Fidelity & Deposit Co. of Maryland, C.C.A. Tex., 117 F. 2d 852, 855;

Citizens Nat. Bank of Waco v. Fidelity & Deposit Co. of Maryland, C.C.A. Tex., 117 F. 2d 852, 855;

Pathe Exchange v. International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, Local No. 306, D.C.N.Y., 3 F. Supp. 93, 94.

United States v. Davis, D.C.N.Y., 3 F. Supp. 97, 98, 99;

Milwaukee County v. M. E. White Co., D. C. Ill., 17 F. Supp. 759, 760;

The Claremont, D.C.N.Y., 20 F. Supp. 163, 164;

Todd v. Russell, D.C.N.Y., 20 F. Supp. 936, 937;

Cold Metal Process Co. v. E. W. Bliss Co., D. C. Del., 21 F. Supp. 509;

Empire Trust Co. v. Hoey, D.C.N.Y., 22 F. Supp. 366;

Securities and Exchange Commission v. Torr, D.C.N.Y., 22 F. Supp. 602;
Gielow v. Warner Bros. Pictures, D.C.N.Y., 26 F. Supp. 425;
Martin v. United Standard Oil Fund of America, D.C.N.Y., 26 F. Supp. 974;
Southwell v. Robertson, D. C. Pa., 27 F. Supp. 944, 945;
Piest v. Tide Water Oil Co., D.C.N.Y., 27 F. Supp. 1012;
Eisman v. Samuel Goldwyn, Inc., D.C.N.Y., 30 F. Supp. 436, 437;
Mutual Orange Distributors v. Agricultural Prorate Commission of California, D. C. Cal., 30 F. Sup. 937, 943;
Bacharach v. General Investment Corporation, D.C.N.Y., 31 F. Supp. 84, 86;
Frigorifico Wilson De La Argetina v. Weirton Steel Co., D. C. W. Va., 31 F. Supp. 214, 217;
Miller v. Rivers, D. C. Ga., 31 F. Supp. 540, 545;
Higgins v. White, D. C. Mass., 31 F. Supp. 796, 798;
Cason v. American Brake Show & Foundry Co., D. C. Colo., 32 680, 682;
Engler v. General Electric Co., D.C.N.Y., 32 F. Supp. 913, 914;
Mengel Co. v. Inland Waterways Corporation, D. C. La., 34 F. Supp. 685, 689;
In re Campbell, D. C. Cal., 35 F. Supp. 100, 101, 102;
Willias v. Pennsylvania R. Co., D.C.N.Y., 1 F.R.D. 941, 942;
Caballero v. Hudspeth, D. C. Kan., 36 F. Supp. 905, 906;

Williams v. New Jersey New York Transit Co., D.C.N.Y., 1 F.R.D. 138.

5. As to the allegations (paragraphs 1, 5, 6 of said motion) that petitioner's cause of action against respondent company "never to have existed" will say that the Opinion of Judge Johnson United States District Judge for the District of Utah, is as well authority as the "Law of the Case". Judge Johnson was the only Federal Judge in the District of Utah and he was as well as familiar with the operations of the respondent-company and its medical system as no other judge residing and holding judgeship under the Federal Government would be. He is learned in the laws of the State and of the Industrial Act of the State of Utah and personally knew and met your petitioner herein prior to his appointment as Federal Judge for the District of Utah in connection with the matter of Nicholas J. Curtis (Nick) v. W. P. Day, State Court at Ogden, Utah.

19. CH. Fa.

Fa. Whether the Circuit Court of Appeals Third Circuit in affirming the judgment of the District Court, is, or, is not:

a. In conflict with its own decision on appeal No. 8027, on substantially the same facts, between the same parties?

b. In conflict with the determination on application for writ of certiorari (63 S. Ct. 993, 318 U. S. 789, 87 L. Ed. 1156)?

c. In conflict with the decisions of every other circuit court of appeals of the United States?

d. In conflict with applicable decisions of this Court?

e. In conflict with the decisions of the district court in the same case, between the same parties, and substantially the same facts?

f. Whether it has decided important questions of Federal law in a way probable untenable or in conflict with the weight of authority?

g. Whether it has decided important questions of Federal law in a way probable in conflict with applicable decisions of this Court?

h. Whether it has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by the district court as in the judgment of this Court calls for the exercise by it of its powers of supervision?

1. Reason Fa. The Circuit Court of Appeals Third Circuit, in affirming the second judgment of the district court, HAS RENDERED a decision in conflict with its first and lawful decision on the first and lawful appeal No. 8027, made, decided and entered on the first and lawful determination made by Judge Thomas G. Walker, and holding:

OPINION.

BEFORE MARIS, JONES AND GOODRICH, CIRCUIT JUDGES.

(Filed December 7, 1942.)

PER CURIAM:

For the reasons sufficiently set forth in the memorandum opinion of Judge Walker filed November 19, 1941, the orders of the district court from which the plaintiff has appealed are affirmed.

A true copy:

Teste: W. P. Rowland,
Clerk of the United States
Circuit Court of Appeals
for the Third Circuit.

In the Second Appeal No. 8664 the appeal came on to be heard before Biggs, Goodrich and McAllister, Circuit Judges.

There were no one appearing for the appellees. Your petitioner responded to the call of his case for argument and by permission submitted the Memorandums (pages 336-340; 340-344 Record) and began his argument.

Theretofore the Court in almost screaming emotion requested to take the case under advisement on the Briefs filed. Counsel for the respondent Utah Fuel Company who made the offers to buy the second judgment of the Court below, on information and belief, came to the door of the clerk's office while your petitioner was therein waiting the clerk and inquired of the hearing of the case and he was advised by Mr. Kelley, Deputy Clerk, that the case

was on for hearing on that day and the appellant was then in there waiting, but did not appear in court and thereby he avoided exposure of the ways and means with which and through which he obtained the second judgment from Judge Guy L. Fake. And thereupon the Court of Appeals filed the following Opinion: Per Curiam: The Judgment of the court below is affirmed.

True Copy (etc.).

March 5, 1945.

2. There are now on the records of the case in the circuit court of appeals two decrees in the same case between the same parties the last one in conflict with its first one; to the same effect in the district court the last and false one obtained by the offers made to Judge Fake by Counsel for the respondents herein to pay to him the full amount involved in conflict with the first one of Judge Thomas Glynn Walker.

3. CONFLICT OF DECISIONS PRESENT IN THE RECORD OF THE CAUSE.

Reviewing the authorities on the question of "conflicting decisions" there is to be found as follows:

There is a "conflict of decisions" between a decision of the Court of Civil Appeals (between the federal district court in the same case, and in the Circuit Court of Appeals Third Circuit in the same case) so as to justify certiorari to review a decision of the Court of Appeals (of the District Court as well as of the Court of Appeals) because of a "conflict of decision", where one opinion of the Court of Appeals (of the Federal District Court, and as well as of the Court of Appeals) rules differently from the Supreme Court's (each one from itself in their two

former adjudications) ruling as to the legal effect of the same or substantially similar facts or controversies a general principle of law stated in decisions of the Supreme Court. Words and Phrases Permanent Edition, Vol. 8, State ex rel., and to Use of Heuring v. Allen, Mo. 112 S. W. 2d 843. At page 846: It is settled that the scope of our review on certiorari is to determine whether there is a conflict of decisions, on the rulings made, between the Court of Appeals and the Supreme Court of State ex rel., Metropolitan Life Ins. Co. v. Allen, 337 Mo. 525, 85 S. W. 2d 469; State ex rel. Superior Mineral Co. v. Hostetter, 337 Mo. 718, 85 S. W. 2d 743; State ex rel. Metropolitan Life Ins. Co. v. Daues, Mo. Sup. 297 S. W. 951; Cumpsey v. Brunmley, 55 S. W. 2d 810, (6);

4. Conflict as noun. Defined generally by the Standard Dictionary as meaning a state or condition of opposition, and judicially as meaning discord of action, feeling. City of Avlene v. McMahan, Tex., 292 S. W. 525, 528 (1). The "conflict which will confer jurisdiction upon the Supreme Court" has been often defined, and never more satisfactorily than in Garitty v. Rainly, 112 Tex. 369, 247 S. W. 825: In other words the rulings alleged to be in conflict must be upon the same question, and unless this is so, there can be no conflict. Cultress v. City of San Antonio, 108 Tex. 150, 179 S. W. 515 (187 S. W. 194); McKay v. Conner, 101 Tex. 313, 107 S. M. 45;

5. Antinomia. In Roman Law . . . inconsistent or conflicting decisions or cases.

Antinomy. A term used in logic and law to denote a real or apparent inconsistency or conflict between two authorities or propositions; same as antinomia (q.v.). Black's Law Dic. 2d Ed.

6. Inconsistent. Things are said to be inconsistent when they are contrary the one to the other so that one infers the negation, destruction, or falsity of the other. W. & Phrases. Citing: O'Malley v. Luzerne County, Pa. 3 Kulp. 41, 46.

7. The word "inconsistent" means "in conflict with" and repugnant to. In re Robertson, 20 F. Supp. 270, at p. 273. "Inconsistent" means mutually repugnant or contradictory; contrary the one to the other, so that both cannot stand. Berry v. City of Fort Worth, Tex. Civ. App. 110 S. W. 2d 95, 103.

8. Repugnant. That is repugnant which "is contrary to anything said before" (Jacob) Stroud's Judicial Dictionary, 2d Ed. Vol. 3, p. 1726.

Reason (Fa.).

9. b. This Court is the primary judge as to the effect the second decree of the circuit court of appeals has on the determination of this Court in 45 S. Ct. 343, 267 U. S. 583, 69 L. Ed. 798, but so long as the second decision of the circuit court of appeals is affirming the decision of a disqualified judge entered on terms of mob practice practiced in open court against your helpless and humble petitioner and his cause, there is no room for doubt that such Decree of fraud and deception is in conflict with the said determination of this Court. The law is well settled on the question and need no further comment.

10. Subd. c. For like reasons the second decree of the circuit court of appeals on appeal No. 8664 is in conflict

with the decisions of every other circuit court of appeals because it violates the rule of "Res judicata" or the "law of the case". The citations set forth above under reason Ea are repeated here.

11. Subd. d. For like reasons the decree on appeal No. 8664 C.C.A. 3d C. is in conflict with the applicable decisions of this Court. It would be a vanity to undertake and compile the decisions of this Court which the said decree would be found to be in conflict, because it would be in conflict with all of them. Courts of justice are not established to do wrongs; nor to stage mobish trials and take the rights of the party in right and give them to the party who pays the judge for the judgment.

12. Subd. e. For like reasons and for the further reason that the decree it affirmed for the district court in the second appeal No. 8664 is in conflict with the first decision of the same Court, in the same case between the same parties and on substantially the same facts, the said second judgment is untenable or in conflict with the weight of authority.

13. Subd. f. The complaints (No. 728 and 2800) raise Constitutional questions of due process, equal protection, and deprivation of civil rights; violation of the Articles of the U. S. Constitution and Amendments thereto, and the Statutes cited on the Caption of the Petition; also the Findings of Fact and Conclusions of Law lawfully entered by Judge Walker on November 19, 1941.

15. Subd. g. For like reasons the circuit court of appeals has decided important questions of Constitutional Law and Statutory Federal Law in conflict with all applicable decisions of this Court.

16. Subd. h. For like reasons and for the reasons that it has on its files and records one decree affirming the first and lawful Findings of Fact and Conclusions of Law by the District Court AND ONE AFFIRMING subsequent and second Findings of Fact, false in substance and in fact, in effect dismissing the companion suit No. 2800, and in effect destroying civil No. 728, thereby sanctioning the departure by the lower Court of the legal and usual course of proceedings thereby sanctioning the rule of non uniformity of decisions by the district court as well as by itself; and for the reason that it granted favors to the respondent-company exempting it from the general and accepted duty to comply with the reasonable rulings of the District Court (page , Record) (Refior v. Lansing Drop Forge Co., 24 F. 2d 440 (3)); and of its own Judgment in Appeal No. 8027; and for the reason that:

17. Judicial power is the power of the Courts to decide and pronounce a legal judgment in accordance with the settled rule of procedure and carry it into effect between the plaintiff, as the case may be, and defendant in the cause submitted to them (Justice Miller's in his Treatise on the Constitution, p. 341) quoted with approval in Muskrat v. United States, 219 U. S. 346, 356; again judicial power is the power that is vested in courts to enable them to administer justice according to law. Sutherland, J.; in Adkins v. Children's Hospital, 261 U. S. 525, 544. See also ex parte Gist, 26 Ala., 156, 162; and again judges are holding their office during good behavior (Re Kaine, 14 How. 103, 120; Ex Parte Bakelite Corporation, 279 U. S. 438) and the behavior of Judge Guy L. Fake cannot be said to be good behavior in the cause of your petitioner herein; and for the reason that the said circuit court of appeals third circuit has so far departed from the

accepted and usual course of judicial proceedings; and it has so far sanctioned such departure by the District Court of the United States for the District of New Jersey as to call upon this Court to exercise by it of its power of supervision.

18. This matter or cause is coming on before this Court on the petitioner's petition for Writ of Certiorari and the cause is fully presented by the petitioner herein who wishes to advise this Court that he will print any and all additional parts of the record if in the judgment of this Court is thought to be necessary and proper for a complete review of the lower Courts. The decision of this Court is essential to a complete review of the Circuit and District Courts. For this additional reason this Court is prayed to conclude to consider the questions presented. Section 240 (a) Judicial Code, 28 U.S.C.A. Sec. 347, 8 F.C.A. Title 28, Sec. 347. United States v. Bankers Trust Co., 294 U. S. 240, 294, 295, 79 L. Ed. 885, 895, 896, 95 A.L.R. 1352. Such action is in the interest of justice and expedition. Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 685, 79 L. Ed. 1119, 1133, 55 S. Ct. 595, 27 Am. Bankr. Rept. (N. S.) 715; Cf. Story Parchman Co. v. Paterson Parchman Paper Co., 282 U. S. 555, 567, 75 L. Ed. 544, 550, 51 S. Ct. 248; Cole v. Ralph, 252 U. S. 286, 290, 64 L. Ed. 567, 574, 40 S. Ct. 321.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, and that the record herein presented by the petitioner, together with the

exhibits to be sent up by the Clerks of the Lower Courts, be accepted as the record of the cause.

Respectfully submitted,

NICHOLAS J. CURTIS, LL. B.,
Petitioner Appearing Pro Se,
Office and Residence:
No. 145 North Broad Street,
Trenton, New Jersey.

Supreme Court of the United States, Drs., ss.

CERTIFICATE.

I, Nicholas J. Curtis, the petitioner in the foregoing petition for Writ of Certiorari, do hereby certify as follows:

I am an LL. B. of an American University authorized by law to grant said Degree, and in addition thereto a course in law, or part thereof, in classes at the University of Utah, and another at the agriculture college of the State of Utah, Logan, Utah; and from the year to date never ceased studying the authorities on the "Laws of the United States". I also have a splendid course in "New Pandecta" written in splendid Greek dialect by professors of the Law Schools of the University or Universities of Greece, together with Opinions from the Attorneys General of Greece. I have no financial assistance from any one and all costs are paid by myself. As this honorable Court will observe from my record, I am able to go on trial if and when the right to have the assistance of witnesses is given to me preparatory to going on trial, but this is denied although the court below could have the

truth established at my expenses. I am very sorry to say that Judge Guy L. Fake is not qualified to go on trial with my cause and myself. This is shown by his past. This is shown by his own statements. And this is shown by his Opinion in my two causes. I have given to me access to the Law Libraries and I have thoroughly studied every point of law present in my cause in the Authorities and Official Reporters and find that my cause now before this Court is meritorious. I, therefore, certify that it is in the public interest as well as in the interest of myself, that the parties-conspirators participating in the conspiracy set forth in my Record be brought to justice according to the laws of the United States.

NICHOLAS J. CURTIS, LL. B.,
Office and Residence:
No. 145 N. Broad St.,
Trenton, New Jersey.

VERIFICATION.

United States of America,
State of New Jersey,
County of Mercer,
City of Trenton.
} ss. Verification.

Nicholas J. Curtis, for himself, upon oath say: That he is a Bachelor of Laws. That he is the petitioner in the foregoing petition; the appellant in the Circuit Court of Appeals for the Third Circuit and plaintiff in the District Court of the United States for the District of New Jersey; that he is the author of every pleading on file in every suit in which he is the plaintiff and of every docu-

ment on file and of record in the causes now before this Court on Petition for Writ of Certiorari; that he is able and willing to proceed to final hearing or trial in the district court and to that end he prepared and presented to the said District Court Motions for Depositions and Motions for Commissions to examine parties and witnesses preparatory to trial; and that if this inherent and inalienable right to give evidence is accorded he is certain that he will prove more than he has complained and pleaded in his pleadings on file and of record; that he has prepared, drafted and typed the foregoing petition to which this verification is made and has actual and personal knowledge of the matters and things therein set forth; and that all matters and things set forth therein are true to the best of his knowledge and belief; and to the best of the matters of record apparent on the face of the record.

Your affiant further states that the said petition for writ of certiorari is prepared and filed in the utmost good faith, convinced from his experience and struggle in the cause in the course of its trials in the courts below that the said Petition is meritorius, and that it is not presented in order to be vexatious or to delay the final opinion and judgment in the case.

NICHOLAS J. CURTIS,
NICHOLAS J. CURTIS, LL. B.,
Affiant and Petitioner,
Office and Residence:
No. 145 North Broad Street,
Trenton, New Jersey.

Subscribed and sworn to before me this 29 day of May, A. D. 1945.

(Seal)

WM. FRIEDMAN,
Notary Public, Mercer County,
State of New Jersey.

NOTICE.

TO THE ABOVE NAMED RESPONDENTS AND THEIR ATTORNEYS OF RECORD:

Please take notice that a petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit is this day sent up to the Clerk of the United States Supreme Court, Washington, D. C., and by him to be docketed according to law and proceeded therewith in accordance with the provisions of Supreme Court Rule 38. A printed copy of the Petition and Record is herewith served upon you.

Yours, etc.,

NICHOLAS J. CURTIS, LL. B.,
Petitioner Appearing Pro Se,
Office and Residence:
No. 145 North Broad Street,
Trenton, New Jersey.

BRIEF IN SUPPORT OF PETITION.

QUESTIONS INVOLVED.

1. Is the judgment of the circuit court of appeals third circuit on appeal No. 8664 a final and appealable judgment?

2. Did the circuit court of appeals third circuit adjudicate any of the issues presented?

3. Did the circuit court of appeals act properly in affirming the judgment of the district court on appeal No. 8664?

4. Is the judgment of the circuit court of appeals on appeal No. 8664 in conflict with:

a. Its own judgment on appeal No. 8027?

b. In conflict with the decisions of the district court in the same matter between the same parties and substantially the same facts?

c. In conflict with the determination of this Court on Petition for Writ of Certiorari No. 779?

d. In conflict with the decisions of every other circuit court of appeals?

e. In conflict with applicable decisions of this Court?

f. In conflict with the weight of authority?

5. Is the second judgment of the said circuit court in the same matter between the same parties and substantially the same facts tenable?

6. Has the said circuit court departed from the accepted and usual course of judicial proceedings? or, Has the circuit court of appeals sanctioned such departure by the district court?

7. Is the judgment of the district court in civil Nos. 728 and civil 2800 supported by the pleadings upon which it purports to have been based?

8. Were the District Court (Guy L. Fake, J.) justified in conspiring with H. Collin Minton, Jr., to take it upon themselves and upset the judgment of:

a. The Circuit Court of Appeals Third Circuit on appeal No. 8027.

b. The Determination of this Court on proceedings for Writ of Certiorari affirming the said judgment of the said circuit court?

c. The Findings of Fact and Conclusions of Law, Memorandum Opinion, entered in civil No. 728, of November 19, 1941?

9. Were the District Court justified in granting motions Nos. 1, 2 and 3 (pages 18-19-20 and 2/3rds of page 21 of Complaint in civil No. 2800)?

10. Did the petitioner herein and plaintiff in the District Court act properly in applying for default and decree pro confesso against the defendant Utah Fuel Company upon its failure to plead or otherwise defend as provided by the Federal Rule of Civil Procedure 12 (a) (1); 55 (a)?

11. Did the petitioner herein and plaintiff in the district court act properly in applying for decree on mandate on the defendant's default and on the authority of the judg-

ment of the circuit court of appeals third circuit, and the determination of this Court on Certiorari No. 779?

12. Did the petitioner herein and plaintiff in the district court act properly in applying to the District Court to take Deposition in accordance with Federal Rules 26; 28 (a) (b); 31 (a) (c) of the Federal Rules of Civil Procedure for the district courts following section 723c of Title 28 U.S.C.A.

13. Is the District Court justified in refusing to either grant the motions or deny them and holding them under advisement and subjecting the plaintiff to humiliations and unnecessary expenditures for so many years and finally conspire with counsel for the defendant Utah Fuel Company and directed him to plead the statute of limitations?

14. Did the plaintiff below and petitioner here act properly in applying for the relief provided by the law found in section 21 of the Judicial Code (Act of August 24, 1937, Ch. 751, 50 Stat. 751, Sec. 13) after he faced the District Court conspiring with H. Collin Minton, Jr., Counsel for the defendant Utah Fuel Company et als.?

15. Did petitioner herein and plaintiff in the District Court act properly in applying to the circuit court of appeals third circuit by Petition for designation of a District Judge to proceed to trial (No. 8395)?

16. Were the said circuit court of appeals third circuit justified in denying relief of and from the arbitrary and conspirative conduct of District Judge Guy L. Fake?

17. Have not the said circuit court of appeals third circuit and the district court of the United States for the Dis-

trict of New Jersey departed off and from the usual course of judicial proceedings and boarded the rowboat of stormy discrimination in the administration of justice against a loyal friend of the United States and its citizens as well as all other persons within its jurisdiction?

18. Are these said courts justified in permitting such an infernal conspiracy to be carried on within their jurisdiction?

19. Was the Circuit Court of Appeals Third Circuit properly constituted to hear appeal No. 8664 when it summoned Circuit Judge Thomas F. McAllister from the 6th circuit to sit in the place of the judges within the circuit who have knowledge of the conspiracy?

20. Is the sum or value in controversy material to sustain the District Court's jurisdiction?

21. Is H. Collin Minton, Jr., counsel pro se Utah Fuel Company et als. privileged to carry on the conspiracy with immunity within the District Court's jurisdiction and within its court rooms thus carrying into execution or part execution the acts of every other conspirator?

22. Are the Attorney General and Assistant Attorney General justified in coming in and entering their appearance as co-counsel with said H. Collin Minton, Jr. and H. Brua Campbell, attorneys for Utah Fuel Company et als; and adopt and stand upon the pleadings of said local attorneys?

23. In Addition to these said questions this Court is petitioned to consider the Questions Involved and set out in

the Brief (pages 1-5) to the Circuit Court of Appeals. Your petitioner herein deems his said brief important to the consideration of this proceeding for the reasons he gives in his petition and this brief. (Hughes Federal Practice, Section 6235.)

STATEMENT OF THE CASE.

1. (Q. Inv. 1. Is the Judgment of the Circuit Court of Appeals Third Circuit on appeal No. 8664 a Final and Appealable judgment?

1. The judgment of the District Court in civil Nos. 2800 and 728 is a final and appealable judgment within the meaning of section 129 of the Judicial Code as it is set out on page 2 of the Appendix of the Rules of this Court (227 U.S.C.A. Title 28). The appeal to the circuit court of appeals third circuit was applied for within thirty days from the entry of the Orders entered on the Opinion of Judge Guy L. Fake in accordance with the provisions to that effect of the said section; and section 240 of the Judicial Code (347 U.S.C.A. Tit. 28) is made applicable to the cases in the circuit court of appeals. The citations set forth under Ch. on page are repeated here. The Mandate of the Circuit Court of Appeals finally settled whatever was before the court. Honold Supreme Court Law, page 1567 and cases cited thereunder (pages 57, 58, 59 of Brief to C.C.A. 3rd C). The matter is fully presented by the petition for certiorari and the court's Decision is essential to a complete review of the District Court. Section 240 (a) Judicial Code (28 U.S.C.A. Sec. 347) United States v. Bankers Trust Co., 294 U. S. 240, 294, 295, 79 L. Ed. 885,

896, 5 S. Ct. 407, 95 A.L.R. 1352. Such action is in the interest of expedition. Continental Illinois National Bank & T. C. v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 685, 79 L. Ed. 1119, 1133, 55 S. Ct. 595;

b. The judgment of the District Court in civil No. 2800 carried with it the life of its companion case civil No. 728 upon which it was based and for which it was intended to protect. The District Court included in its Opinion in Civil No. 2800 Civil No. 728 notwithstanding its adjudication upon the demurrer of the defendants, upon appeal to circuit court of appeals and the proceedings for writ of certiorari in this Court.

2. (Q. Inv. 2. Did the Circuit Court of Appeals Third Circuit adjudicate any of the issues presented?)

2. The Circuit Court of Appeals failed to adjudicate the issues presented. Further argument on this see: Your Petitioner's Brief to the said circuit court of appeals. b. Ch. pages of the foregoing petition.

3. (Did the circuit court of appeals act properly in affirming the judgment of the District Court on appeal No. 8664?

3. (Q. Inv. 3. The Circuit Court of Appeals committed a grave error in affirming the second judgment (on appeal No. 8664) of the District Court. For further argument on the question see Ch. N. O. pages 142-162 of Appendix hereunder; also Questions Involved 19, 20, 21, 22, 23, pages 45 to 57 of the Brief to said C.C.A. 3rd C. No. 8664; Ch. Ea. Pet.

Upon the failure of the circuit court to write an Opinion and give its reasons upon which it based its Opinion, out of necessity, the Opinion of Judge Guy L. Fake must be

read into that of the circuit court of appeals; and reading said opinion into that of the C.C.A. 3rd C. No. 8664, it destroys the Opinion of the District Court entered November 19, 1941, on the demurrer of the defendants Utah Fuel Company et als.; and in turn its own judgment in appeal No. 8027. For further argument and authorities upon this question see Ch. N. O. pages 142-162 of the foregoing petition.

4. (Q. Inv. 4. Is the judgment of the circuit court of appeals on appeal No. 8664 in conflict with:
a. Its own judgment on appeal No. 8027?

4. a. The said judgment is in conflict with its previous judgment in No. 8027 appeal. In its prior judgment the said court held as follows: PER CURIAM:
For the reasons sufficiently set forth in the memorandum opinion of Judge Walker filed November 19, 1941, the orders of the District Court from which the plaintiff has appealed are affirmed. For further argument on this see Ch. D. pages 20-23, Ch. Fa. pages 106-114 of foregoing petition.

4. b. (In conflict with the decisions of the District Court in the same matter between the same parties and substantially the same facts?)
b. The said judgment of the circuit court of appeals is in conflict with the decision of the District Court of November 19, 1941. See argument and authorities under Ch. of foregoing petition.

4. c. (In conflict with the determination of this Court on Petition for Writ of Certiorari No. 779?)

4. c. The reported case shows that this court affirmed the judgment of the circuit court of appeals on appeal No.

8027; taking it that it means what is said, the said judgment of the C.C.A. 3rd C. is in conflict with the said judgment of this court.

4. d. (In conflict with the decisions of every other circuit court of appeals?)

4. d. It is in conflict with the decision of every other circuit court of appeals. Further argument and authorities and citations of cases cited, see Questions Involved 17 to 23 inclusive of Brief to C.C.A. 3rd C.; also Ch. N. O. pages 142-162 of foregoing petition and the argument set forth in the appendix pages; Ch. Ea. Pet.

4. e. (In conflict with applicable decisions of this Court?)

4. e. By reference the authorities cited above in 4. d. are repeated here. It is as well untenable as unnecessary to repeat the same thing over and over again. (Direct and concise. Sup. Ct. Rule 38, 2.)

4. f. (In conflict with the weight of authority?)

4. (f. By reference the argument cited in 4. c. above are repeated here.)

5. (Q. Inv. 5. Is the second judgment of the said circuit court in the same matter between the same parties and substantially the same facts tenable?)

5. The judgment of the said circuit court is untenable because it deprives the petitioner herein of the property rights which he acquired under the previous judgment of the District Court and of the same court. To the same

effect and with like force the Opinion written and entered by Judge Thomas Glynn Walker on November 1, 1941. It deprives the petitioner herein of property without due process of law.

6. a. See Reason J. K. L. M. of Petition to which this Brief is attached; Van Fleet's Former Adjudication. Demurrer Matters Settled Upon Res Judicata (pages 672-674; pages 162-172) Pet.

6. a. See Reason of Petition to which this Brief is attached Van Fleet's Former Adjudication. Demurrer Matters Settled Upon Res Judicata (pages 672-674).

b. The Memorandum Opinion of Judge Thomas Glynn Walker, see citation above and below) and the judgment of the C.C.A. 3rd C. on appeal No. 8027, set at rest the matters and things adjudicated. In such case another proceeding can not be maintained upon the cause, nor upon any part of it on a matter or question, or matters or questions either of law or fact are res judicata, or set at rest.

The Bar is absolute. The Bar to a fresh trial or decision on account of the principle of res judicata is absolute, and as against all the parties to the suit in which that decision was passed. Van Fleet's Former Adjudication. Sec. 1 et seq.

c. Departed: 2. Separated, parted; schismatic apostate. Oxford Dict.; Usual: 1. That in ordinary use or observance; having general currency, validity, or force; commonly observed or practiced. Oxford Dict.; Course: 22. A planned or prescribed series of actions or proceeding. Oxford Dict.: Judicial proceedings: A general term for proceedings relating to, practiced in, or proceeding from, a

court of justice; or the course prescribed to be taken in various cases for the determination of a controversy or for legal redress or relief. Black's Law Dict. Second Edition. Citing: See Hereford v. People, 197 Ill. 222, 65 N. E. 310; Martin v. Simpkins, 20 Colo. 438, 38 Pac. 1002; Mullen v. Reed, 64 Conn. 240, 29 Atl. 478, 24 L.R.A. 664, 42 Am. St. Rep. 174; Aldrich v. Kinney, 4 Conn. 386, 10 Am. Dec. 151.

The answer is that the C.C.A. 3rd C. has departed, and well and good from the accepted and usual course of judicial proceedings; and it has repeatedly sanctioned the departure by the District Court without probable cause.

7. (Q. Inv. 7. Is the judgment of the district court in civil Nos. 728 and civil 2800 supported by the pleadings upon which it purports to have been based?)

7. The judgment of the District Court in civil Nos. 728 and civil 2800 is not supported by the pleadings upon which it is purported to have been based. Not only the Opinion is not based upon nor supported by the motions filed, but on the contrary it contains utter falsifications of the same as well as the whole proceedings and declaration of civil No. 728. For further argument on this see Ch. Y. Z., pages 82-86, of foregoing petition wherein the motions filed are set forth.

8. Q. Inv. 8. Were the District Court (Guy L. Fake, J.) justified in conspiring with H. Collin Minton, Jr., to take it upon themselves and upset the judgment of:

a. The Circuit Court of Appeals Third Circuit on appeal No. 8027?

b. The Determination of this Court on proceedings for

Writ of Certiorari affirming the said judgment of the said circuit court?

c. The Findings of Fact and Conclusions of Law entered in civil No. 728, of November 19, 1941?)

The District Court or Judge Guy L. Fake is not justified in joining H. Collin Minton, Jr., counsel pro se, Utah Fuel Company, et als., and staging the conspiracy they staged in open court in the court room of said judge thereof, and in taking it upon themselves to deprive your petitioner of life, liberty and property without due process of law. Wong Wine v. U. S., 163 U. S. 228, 238; Terrace v. Thompson, 263 U. S. 197, 216. See also Truax v. Raich, 230 U. S. 33, 39; Home Ins. Co. v. Dick, 281 U. S. 397. There is no reason in law why a United States Judge should go off the Judicial Course of Proceedings and join in with the counsel for the defendants in a civil action and dictating ways and means to destroy the plaintiff in the cause. Procedural Due Process. Whatever else may be uncertain about the definition of the term, all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure. Ochoa v. Hernandezy Morales, 230 U. S. 139. By reference the parts of the U. S. Const. and Authorities and cases cited and quoted on pages 18-36 of the Brief to C.C.A. 3rd C. are repeated here.

9. (Q. Inv. 9. Were the District Court justified in granting motions Nos. k, 2, and 3 (pages 18-19-20 and 2/3rds of page 21 of Complaint in civil No. 2800)?

9. Judge Thomas G. Walker erred in applying and construing the law found in section 112 (Judicial Code, Section 51) U.S.C.A. Tit. 28 to motions numbered 1, 2 and 3.

In other words, conformity applies only in the absence of direct congressional legislation upon the subject (Hughes Federal Practice, Vol. 6, Ch. 78, Sec. 3562. Citing: Note 55. Berry v. Mobile & O. R. Co. (1) C. Ky. 1915, 228 F. 395) and goes no further than to provide a general rule regulating practice and procedure in the absence of express congressional enactment on the subject, and does not repeal any previous act of Congress expressly requiring a particular mode of proceeding in any given class of case. 56 (Wear v. Mayer, 6 F. 658-660). For further argument on the question see Ch. , pages , of foregoing petition to which this brief is a part.

10. (Q. Inv. 10. Did the petitioner herein and plaintiff in the District Court act properly in applying for default and decree pro confesso against the defendant Utah Fuel Company upon its failure to plead or otherwise defend as provided by the Federal Rules of Civil Procedure (12, (a) (1); 55 (a)?

10. The application for default judgment is a matter of right. For further argument on this subject see Question Involved 27, on pages 62-66 of Brief to C.C.A. 3rd C. Also Ch. of foregoing Petition.

11. (Q. Inv. 11. Did the petitioner herein and plaintiff in the District Court act properly in applying for decree on mandate on the defendant's default and on the authority of the Judgment of the circuit court of appeals third circuit, and the determination of this Court on Certiorari No. 779?)

11. The procedure followed is governed by Federal Rule 55. See pages 62-66 of brief to C.C.A. 3rd C.

12. (Q. Inv. 12. Did the petitioner herein and plaintiff in the District Court act properly in applying to the District Court to take depositions in accordance with Federal Rules 26; 28 (a) (b); 31 (a) (c) of the Federal Rules of Civil Procedure for the District Courts following section 725c of Title 28 U.S.C.A.)

12. The right to give evidence is an inherent and inalienable right from times immemorial. It is a common law right. It is a Constitutional right (Amdt. VI). And it is a statutory right (Section 43 of Tit. 8, U.S.C.A.) and it is embodied into the Federal Rules of Civil Procedure for the District Courts of the United States following Section 723c of Tit. 28 U.S.C.A., Rules 26, 28 (a) (b); 31 (a) (c).

In this case in the Courts below the defendants come and say the plaintiff is so and so and no proof is required from them. The plaintiff sets forth the truth in his declarations and pleadings and moves the court at the plaintiff's expenses to examine parties and witnesses as well as the records of places in which he was incarcerated for suing the defendant Utah Fuel Company. The District Court answered: Yes, give me your proceedings and I will take them under my advisement. It took the petitioner's proceedings under advisement now going five years ago and still keeps them under its advisement. It now joined in the conspiracy and declared that the plaintiff must die in poverty a martyric death. It surely sounds like a court of justice speaking impartially while it was administering justice.

13. (Q. Inv. 13. Is the District Court justified in refusing to either grant the motions or deny them and holding them under advisement and subjecting the plaintiff to humiliations and unnecessary expenditures for so many

years and finally conspire with counsel for the defendant Utah Fuel Company and directed him to plead the statute of limitation?)

13. This is another grave error on the part of the District Court as well as the Circuit Court of Appeals. There may be other persons in the United States as equally good as the petitioner and more better men in every way than the petitioner; and there may be others more loyal to the United States and its citizens than this petitioner is; but there is no reason in law or equity why this petitioner may not have the testimonies of his witnesses in his defense while in the hands of the conspirators. While his applications to take Depositions on written interrogatories are thus held up by the District Court, it placed Civil No. 728 on the Trial Calendar at Newark before Judge Fake. How could this petitioner go on trial which is staged in execution of the conspiracy between Judge Guy L. Fake and H. Collin Minton, Jr., without the testimonies of his witnesses to try and dismiss the cause on the authority of 104-C, 2, Laws of the State of Utah?

14. (Did the plaintiff below and petitioner here act properly in applying for the relief provided by the law found in Section 21 of the Judicial Code, as amended by the Act of August 24, 1937, Ch. 754, 50 Stat. 751, Section 13, after he faced the District Court conspiring with H. Collin Minton, Jr., Counsel pro se and Utah Fuel Company et als.?)

14. Any suitor in a civil cause who will face his wrong doers or conspirators in a court room, out of necessity and for the protection of his person, will have to resort to relief from his wrongdoers. The proceedings are not based upon information and belief, but upon statements

made in furtherance of the object of the conspiracy made so and intended to destroy the petitioner and his cause. See paragraph 4 of statement of the case in brief to C.C.A. 3rd C. on Appeal No. 8664; pages 8 to top of page 11 of Questions Involved; pages 30-35; pages 69-87 of said Brief; pages 287-308, Record.

15-16. (Did petitioner herein and plaintiff in the District Court act properly in applying to the Circuit Court of Appeals Third Circuit by Petition for designation of a District Judge to proceed to trial (No. 8395?)

This is a matter of self defense. So long as Congress was aware that sovereign powers are delegated to the agencies of the Government and might be used to satisfy personal and arbitrary ambitions of those agents who happened to be entrusted with such powers, and thought it to be just and reasonable to enact definitions and limitations of those powers there is no reason whatever why not resort to statutory relief from the hands of oppressors. Such is the law found in the statutes cited above. Berger v. U. S., page , Petition; pages 72-73, Brief to C.C.C.A.; Yick Wo v. Hopkins, pages 77-78, Brief to C.C.A. 3rd C.; Mitchell v. U. S., pages 73-76, Brief to C.C.A. 3rd C.; Whitaker v. McLean, Full Decision, pages 69-72 Brief to C.C.A. 3rd C. As long as there is such Act of Congress always ready for every one; always at the aid and assistance of every one; why not to the aid of this petitioner? The statute can only be falsely used by making and filing a false affidavit and if this petitioner have had done such thing the conspirators would have been on top of him the very minute he exhibited his affidavit or proceeding. Berger v. U. S., supra. The charges were and are true and the proceedings reasonable and just under the law, and the denial of the relief prayed for by the petitioner was unreasonable, untenable and unlawful.

17. (Q. Inv. 17. Have not the said Circuit Court of Appeals Third Circuit and the District Court of the United States for the District of New Jersey departed off and from the usual course of judicial proceedings and boarded the rowboat of stormy discrimination in the administration of justice against a loyal friend of the United States and its citizens as well as all other persons within its jurisdiction?)

18. (Q. Inv. 18. Are these said courts justified in permitting such an infernal conspiracy to be carried on within their jurisdiction?

The Opinions of this Court in the matters of: United States v. Kissel; Hyde and Schneider v. United States; and Brown v. Elliott set forth in the Appendix by reference are made parts of the argument on this question. The principles of the law of conspiracy as applied and construed by this Court in those said cases govern the conspiracy before this Court on this proceeding. Further, it is the duty of the Court below to finally determine the entire controversy before it, and to do complete justice by adjusting all the rights involved therein. Sanborn, Van Devanter, Hook, and Adams, in Re. U. S. v. Standard Oil Co., 152 Fed. 290. The Court below are bound to proceed to judgment and to afford redress to the plaintiff before them. Snydam v. Broadnax, 14 Pet. 67; Union Bank v. Jolly's Administration, 18 How. 503. Where a case, as in this case, is made upon a bill which is within the jurisdiction of the Court below, it is bound to maintain such action and proceed to trial. The law should and ought to be enforced as against all.. McCleland v. Garland, 217 U. S. 268. This rule of law does not govern Judge Guy L. Fake, and in so far as the petitioner's cause is concerned, never did. Falsity rules and falsity governs.

19. (Q. Inv. 19. Was the Circuit Court of Appeals Third Circuit properly constituted to hear Appeal No. 8664?) See the Record, page 345. This is a New Jersey case and has flared up as it is stated in the Petition and the Pleadings making up the record. Further argument on this is not permitted. This Court may infer what is going on.

20. (Q. Inv. 20. Is the sum or value in controversy material to sustain the District Court's jurisdiction?)

The sum or value of the matter in dispute is immaterial in cases which are within the inhibition of the Civil Rights Act which are set forth in the subdivisions of Section 41 of Tit. 28 U.S.C.A.; to the same effect and with like force Sections 1 to 7, 15, 26 of Tit. 15; and all other jurisdictional subjects set forth thereunder. Last clause of Section 41 of Title 28 U.S.C.A. See the parts of the statutes set forth in full in the Appendix here.

21. (Q. Inc. 21. Is H. Collin Minton, Jr., counsel pro se, Utah Fuel Company et als., privileged to carry on the conspiracy with immunity within the District Court's jurisdiction and within its court rooms thus carrying into execution or part execution the acts of every other conspirator?)

21. This is a cause where several persons conspire to unlawfully injure the petitioner herein. They are jointly and severally liable. Cooly on Torts, 4th Ed. Sec. 47. See the several sections set forth in the Appendix. By way of reference the same are repeated here. This said counsel has been given his own way and openly stages bargains to buy the judgment of the court and practices every deception to accomplish the object of the conspiracy as it has been operated by his associates in crime. Perjured and infernal papers are gathered all over where the conspiracy

has been operated by his fellow conspirators and for the fee paid to him by the operators of the conspiracy he goes on into court and stages his mob tactics and off he goes as Mr. Minton. He does these in both of the lower courts and he is prepared to keep on doing it knowing that the instructions he receives from the officials of the Utah Fuel Company are perjured and deceptive but nevertheless he personally carries on the conspiracy to every step of its execution; and now and then he mobs your petitioner herein physically and personally and now and then assisted by others. There is no reason in law why he should be free to carry on the conspiracy and openly defeat the administration of justice in the courts of the United States. Further on this see his Motion for Injunction and the exhibits attached thereto.

22. (Q. Inv. 22. Are the Attorney General and Assistant Attorney General justified in coming in and entering their appearance as co-counsel with said H. Collin Minton, Jr., and H. Brua Campbell, attorneys for Utah Fuel Company, et als.; and adopt and stand upon the pleadings of said local attorneys?

The attorney general is a member of the Board of Criminal Identification of the State of Utah (22-0-1 R. S. Ut.) As such he has the record of your petitioner under his jurisdiction. He knows that the State of Utah has not and never has had a cause to make a lawful complaint against your petitioner, nevertheless they took up the defense of those who were made and paid to carry on the conspiracy IN ORDER TO COVER the criminal operations of the defendant Utah Fuel Company. Further on this see pages of the Record. Will it be unjust to require them to produce the records of the Criminal Insane Asylum at Provo, Utah, and show that the facts are or are not as stated in the pleadings? May we not examine those who executed

the barbaric theriodies in defense of the respondent Utah Fuel Company? They are natural persons and subject to confrontation. May they not be confronted?

SUMMATION.

1. The salary ($15.00) paid to the petitioner herein by the respondent Utah Fuel Company for his services as interpreter and the protection afforded to him was very, very absurd.

2. The respondent Utah Fuel Company was under general contractual obligation to furnish the needed medical treatment, operation, hospitalization, to the brother of this petitioner.

3. The employment of this petitioner as nurse for his brother and the use of petitioner's home and use as hospital was unreasonable, unjust and a breach of its contractual obligations for which it collected pay for the same for years therebefore and thereafter.

4. The duty to transport its patient to Salt Lake City to its general hospital was the duty of the respondent company.

5. The reception by the chief medical staff of the respondent, Utah Fuel Company, of the brother of the petitioner and his entry into its general hospital was in conformity with the usages of said company.

6. The failure to give the needed medical treatment and operation during the first ten days in the hospital and the

placing said patient in the basement without any medical attention was a breach of its contractual obligation.

7. The removal of said patient out of said general hospital of the said respondent by its medical staff and placing him outside as a tubercular to be and remain there to the end of his life was a breach of its contractual obligation as well as an indication to commit a criminal act.

8. The said respondent's failure to use the hospital's X-ray apparatus to diagnose the cause of the case of its patient was a breach of its contractual obligations.

9. The Notice, to-wit: "There is not a thing we can do for your brother." "All we can do is to give him plenty fresh air," given by the said respondent's. Chief Medical Staff to this petitioner was a final notice to the effect that the said respondent-company refused to perform its contractual obligation and thus abandoned the brother of this petitioner to die a martyric death rather than give him the medical treatment-operation for which it received pay for same.

10. The said notice as thus given to the petitioner by said Chief Medical Staff, and this petitioner being the sole and only custodian of his dying brother; dying for lack of medical treatment and operation, your petitioner herein became of duty, moral, Christian, and brotherly duty to remove him to a private hospital and to place him under the care of private doctors.

11. The recovery back to normal health of respondent's patient in private hospital and under private doctors constituted conclusive proof of the respondent's malpractice.

12. The private hospital received the respondent's patient only on the conditions that if your petitioner MAKES GOOD THE PATIENT'S bills and pays the doctors. Thus your petitioner obligated himself to make good and promptly pay all bills if the private hospital would receive the dying brother of your petitioner and afford to him human hospitalization, care and treatment. And thus and only thus your petitioner paid up all hospital and doctors' bills and reasonable-modest convalescent bills.

13. The right to sue and recover the sums expended in the course of discharging the duties of the said respondent Utah Fuel Company thus as aforesaid forced upon your petitioner by the said medical staff of said respondent is: a. Constitutional right (Constitution of the State of Utah, Art. 1, Sec. 11); b. It is a Statutory right (R. S. Ut. 42-1-57); c. A contractual right (R. S. Ut. 42-1-50); d. A common-law right; and e. A Federal Statutory right (U.S.C.A. Tit. 8, Sec. 41).

14. The suit as filed on the 25th day of April, 1919, in the U. S. Dist. Ct. D. of Utah satisfied the requirements of the State Statute of Limitations of the State of Utah.

15. The judgment of the said U. S. Dist. Ct. is the law of the case in so far as it obliged your petitioner to sue the said respondent-company in the U. S. Dist. Court for the District of New Jersey.

16. The said respondent's resorting to the institution of criminal proceedings against your petitioner was its only way out with which they covered their malpractices and infernal and criminal practices and operations.

17. The character of the said respondent-company is not and never has been free from lawsuit and other judicial or quasi judicial proceedings (The Reported Cases against it. See The Reports of the State of Utah and The Industrial Commission of same State) so as to make it an offense to sue the said respondent-company by your petitioner.

18. The acts constituting a criminal conspiracy are embraced within the law found in R. S. of Utah—103-11-1. The same definition is given by R. S. New Jersey—2:119-1.

19. The position taken and maintained by the Authorities of the State of Utah is unwarranted by the principles of law and usages of the Courts of that State. That state not only has not, or ever have had, a cause of action or right to institute any proceeding against your petitioner, but on the contrary it has deprived him of his property (farm at Corinne, Ut., farm-house, etc.) without due process of law and on perjured affidavits to the effect that your petitioner gave up his property and went to fight for King Ferdinand of Greece. The absurdity of these facts is clear.

20. The position taken and maintained by the authorities of the United States and particularly the Federal Courts for the Districts of Utah, New Jersey, Southern District of New York together with some State Courts, and more particularly District Judge Guy L. Fake of the District Court of the United States for the District of New Jersey is utterly unwarranted as being tainted with favoritism and are repugnant to the Constitution and Acts of Congress of the United States.

21. The conduct of counsel for respondent Utah Fuel Company et als. and Judge Guy L. Fake of the District

Court of the United States within and for the District of New Jersey present a shocking revelation of the formation and operation of the conspiracy and there is no reason in law why said District Judge should be permitted to take any further part in the case.

22. There is no judicial error in the Opinion of Judge Guy L. Fake, which opinion is now on review before this court, because the said Opinion was formed with deliberation by and between counsel for the respondent Utah Fuel Company and Judge Guy L. Fake, deliberated preparatory to the issuance of the motion upon which it is based.

23. The application for injunction and exhibits attached thereto present a bold revolt against law and order, court rules and judicial proceedings have had in the case and gave to the Federal District Court for the District of New Jersey full and complete jurisdiction over the subject matter and over every person who has in any way participated in the conspiracy now before this Court.

24. The character of your petitioner is of the good character to be found upon any good man in the world; any and all pretenses to the contrary are mere absurdity.

25. There are enemy aliens charged with the crime of sedition and with every other crime against the existence of the Government, and yet, they are afforded the right of the assistance of counsel for their defense and here in this case a peace-loving person, friend of the United States and its citizens as well as all persons within their jurisdiction, persecuted and prosecuted criminally ever since the year 1919; and now we have Judge Guy L. Fake, Senior Judge of the District Court of the United States District of New Jersey, boldly and openly conspiring with counsel for the

respondent Utah Fuel Company and from the Bench of Justice shouting all these (the proceedings had before him) ARE ILLEGAL. WATCH THE LAWYERS—WATCH WEINBERGER (ETC.).

Accordingly, I urge that the Petition for Writ of Certiorari be granted as warranted by the principles of law and usages of this Court. I further urge that the Decree of the Circuit Court of Appeals Third Circuit on Appeal No. 8664 be nullified and made null and void with appropriate directions to make null and void the Orders of the District Court on Motions numbered 1, 2, and 2 by Hon. Thomas Glynn Walker, D. J.; and to the same effect and likewise to make null and void the Opinion of Fake, D. J. and the Orders made and entered thereon dismissing Civil No. 2800 and destroying Civil No. 728 U. S. District Court District of New Jersey.

Respectfully submitted,

NICHOLAS J. CURTIS, LL. B.,
Petitioner Appearing Pro Se,
No. 145 North Broad Street,
Trenton 8, New Jersey.

To: United States District Court, District of New Jersey, Trenton, N. J.;
H. Collin Minton, Jr., Counsel pro se, Utah Fuel Company, et als., Trenton Trust Bldg., Trenton, New Jersey;
George A. Cella, Attorney for George Lavdas and Louis Antonopoulos, No. 143 East State Street, Trenton, New Jersey;
William V. Rosenkrans, Counsel Pro Se, No. 5 Colt Street, Paterson, New Jersey;
Carol C. Johnson, Counsel Pro Se, No. 68 Williams Street, Borough of Manhattan, New York City, N. Y.

APPENDIX.

REASONS (N.) (O).

1. Under the Constitutional Amendment of 1884 Sec. 6 designed to prevent repugnancy of Rulings between Courts of Appeals or between them and the Supreme Court, the word "rulings" means expositions of the law or the legal reason on which the Courts rested their judgments on the questions presented. Friedman v. Maryland Casualty Co., 71 S. W. 2d 491, 496, 228 Mo. App. 680.
(21 C. J. S. Sec. 195, at page 339.)

Ruling on Motion to Dismiss, or Nonsuit.

2. A ruling on a motion to dismiss has been held to be the law of the case as to matters thereby adjudicated. 74

74 Potts v. Village of Haerstraw, 93 F. 2d 506; C. I. T. Corporation v. Sanderson, 49 F. 2d 937; Weagant v. Bowers, 49 F. 2d 934; Commercial Union of America v. Anglo-South American Bank, 10 F. 2d 937; Piest v. Tide Water Oil Co., 27 F. Supp. 1021; Presidio Mining Co. v. Oberton, 261 F. 933, affirmed 270 F. 388, and certiorari denied; Martin v. Presidio Mining Co., 41 S. Ct. 535, 256 U. S. 694, 65 L. Ed. 1175; United Drug Co. v. Cordley & Hayes, 132 N. E. 56, 239 Mass. 334; Darling v. Abbot, 191 N. W. 20, 221 Mich. 449; Schickler v. Penrod Co., 227 N. Y. S. 331, 222 App. Div. 627; Barber v. Rowe, 193 N. Y. S. 157, 200 App. Div. 290; Sterling Bag Co. v. City of New York, 11 N. Y. S. 2d 297, 256 App. Div. 645; Henry v. New York Post, 5 N. Y. S. 2d 716, 168 Misc. 247, affirmed 8 N. Y.

S. 2d 1022, 255 App. Div. 973; Sterling Bag Co. v. City of New York, 4 N. Y. S. 2d 521, 168 Misc. 179; Halzer v. Deutsche Eichsbahn Gesellschaft, 28 N. Y. S. 2d 284.

A plea to the jurisdiction should not be entertained on a particular ground after a motion to dismiss based on the same ground has been overruled. Martin v. Chicago, etc. Electric R. Co., 77 N. E. 86, 220 Ill. 97.

3. Rulings of Different Judges; Those of Each Judge the "Law of the Case," and is Binding Upon Every Other Judge of the Same Court.

21 C. J. S. Section 195, at page 340, 2d Col.

Different Judges. Ordinarily becomes the law of the case in that court; 85 (Aachen & Munich Fire Ins. Co. v. Guaranty Trust Co. of New York, 24 F. 2d 465, reversed on other grounds, 27 F. 2d 674 and certiorari denied. (See 49 S. Ct. 83, 278 U. S. 648, 73 L. Ed. 560; Farmers' Loan & Trust Co. v. Miller, 298 F. 758, reversed on other grounds see 9 F. 2d 848) and one judge of a court should not ordinarily review or disturb the rulings of another judge of the same or a coordinate court in the same case. 86

86 U. S. ex rel. Hughes v. Gault, 13 F. 2d 225; Commercial Union of America v. Anglo-South American Bank, 102 2d 937; The Material Service, 11 F. Supp. 100, affirmed, Leathen Smith-Putnam Navigation Co. v. Osby, 79 F. 2d 280, certiorari denied 56 S. Ct. 370, 296 U. S. 653, 80 L. Ed. 465; Kings County Lighting Co. v. Nixon, 268 F. 143, affirmed Newton v. Kings County Lighting Co., 42 S. Ct. 268, 258 U. S. 180, 66 L. Ed. 550; Harris v. Chicago House Wrecking Co., 145 N. E. 666, 314 Ill. 500, reversing 226 Ill. App. 220; Second Nat. Bank v. Leary, 187 N. E. 611, 284

Mass. 321; United Drug Co. v. Cordley & Hayes, 132 N. E. 56, 239 Mass. 334; Henlun Holding Corp. v. Ess Bros. Holding Corp., 239 N. Y. S. 259, 228 App. Div. 102; Endurance Holding Corporation v. Kranmer Surgical Stores, 238 N. Y. S. 377, 227 App. Div. 582; Mutual Thread Co. v. Oriental Textiles, 176 N. Y. S. 313, 188 App. Div. 104; Western Manufacturing & Oil Co. v. American Spirits Mfg. Co., 1175 N. Y. S. 345, 187 App. Div. 230; Tallassee Power Co. v. Peacock, 150 S. E. 510, 197 N. C. 735; Rhode Island Co. v. Superior Court, 104 A. 634, 42 R. I. 5; Georgian Co. v. Britton, 139 S. E. 217, 141 S. C. 163; 15 C. J. 961 note 36 (g) (h), p. 963 Note 49.

4. Proper Judicial Comity would require me to follow my colleague. American Scantic Lince, Inc. v. United States, 27 Fed. Supp. 271; Brusselback et al. v. Cago. Corp., 24 F. Supp. 524, at page 531. The general rule is that a matter which is decided by any District Judge within the District should be, as a matter of comity without re-examination by another judge, so decided. United States v. Hirschhorn D. C., 21 F. 2d 758. See also, 21 C. J. S., Courts, Sec. 196.

5. United States v. Hirschhorn, just above.

(1) Confronted as I am by this array of judicial precedents I am considerably embarrassed in arriving at a decision as to what my own course should be, especially in view of the general rule that a matter which is decided by any District Judge in this district should be, as a matter of comity, without re-examination by another judge, so decided, and that among the opinions presented to me is one from this district.

6. In the absence of a ruling by an appellate court, a former ruling of a Federal District Court will thereafter be

followed by the Courts of that District. In re Markowitz, 233 F. 715. See also, Cyc. Fed. Proc. Sec. 685, at page 293.

7. The general rule is that a matter which is decided by any district judge within the district should be, as a matter of comity, without re-examination by another Judge, so decided. Cyc. of Fed. Proc. Sec. 685 (at page 293). Citing Long v. Dick, 38 F. Supp. 214.

8. Opinions of the Circuit Court of Appeals the "Law of the Case" and is Binding on the Same Court as well as the Court Below.

Cyc. of Fed. Proc. Sec. 684. Opinions of Circuit Court of Appeals.

(For further proceedings to be there taken in pursuance of such determination. 877 U.S.C.A. 28. See p. 28a of Appendix.)

In a system of jurisprudence founded upon stare decisis it does not lie within the domain of a court of first instance to take it upon itself to upset a rule of long standing without most pressing circumstances to demand it. McCarty v. Palmer, 29 F. Supp. 585. Circuit Court of Appeals decisions are therefore binding in their own circuit, on themselves and the district courts, in so far as they are in harmony with the decisions of the Supreme Court. E. Edelmann & Co. v. Triple A. Specialty Co., 88 F. 2d 852, certiorari denied 300 U. S. 680, 81 L. Ed. 884, 57 Sup. Ct.; In re King, 46 F. 2d 112; Hartford & New York Transp. Co. v. Rogers & Hubbard Co., 40 F. 2d 954, aff'd 47 F. 2d 189; In re Imperial Irrigation Dist., 38 F. Supp. 770; Burris v. American Chicle Co., 33 F. Supp. 104, modified, 120 F. 2d

218; Bourgois, Inc. v. Willingmyer, 33 F. Supp. 863; United States v. Rollnick, 33 F. Supp. 863; United States v. LaVine, 28 F. Supp. 113; United States v. Eighty Acres of Land in Williamson County, 26 F. Supp. 315; Cookson v. Louis Marx & Co., 23 F. Supp. 615.

A decision of a Circuit Court of Appeals is authoritative and binding upon a district court of the same circuit. Elliott v. Wheelock, 34 F. 2d 213; United States v. Goldman, 28 F. 2d 424; Young v. John McShain, Inc., 39 F. Supp. 521; Forstmann v. Rogers, 35 F. Supp. 916. A former decision from which the Supreme Court denied certiorari is especially binding. H. Wagner & Adler Co. v. Mali, 74 F. 2d 666.

9. (21 C. J. S. Sec. 195 at page 330.)

Previous decisions in same Case as Law of the Case.

A. Definition, Nature and Distinctions.

"Law of the case" is the controlling legal rule of decisions, as established by a previous decision, between the same parties in the same case. It is a rule of practice, and generally is distinguishable from res judicata and stare decisis.

"Law of the case" has been defined as the opinion delivered on a former appeal. 10

10 Hocker v. Louisville, etc. R. Co., 96 S. W. 526, 29 Ky. 1, 842; 36 C. J. p. 964 note 33. More specifically, it means that whatever is once irrevocably established as the controlling legal rule of decision between the same parties in the same case continues to be the law of the case, whether correct on general principles or not, so long as the facts on

which such decision was predicated continue to be the facts of the case before the court." 11

11 Gypsum Co. v. Columbia Casualty Co., 169 So. 532, 124 Fla. 633; Hutchings v. Roquemore, 150 S. E. 571; 40 Ga. App. 566; Harris v. Chicago House Wrecking Co., 145 N. E. 666, 314 Ill. 500; reversing 226 Ill. App. 220; Anderson v. Dougherty, 207 S. W. 474, 182 Ky. 800; Woodward v. Snow, 124 N. E. 35, 233 Mass. 267, 5 A.L.R. 1381; In re Taylor Estate, 2 A. 2d 317, 110 Vt. 80.

10. NATURE: The Doctrine of the law of the case is a rule of practice and not a principle of substantive law. 12

(12 Sands v. American Ry. Express Co., 198 N. W. 402, 159 Minn. 25; Perkins v. Vermont Hydro-Electric Corporation, 177 A. 631, 106 Vt. 367.)

It expresses the practice of the courts generally to refuse to reopen what has been previously decided in the same case. 13

13 Messinger v. Anderson, 32 S. Ct. 739, 225 U. S. 436, 56 L. Ed. 1152; Lewith v. Irving Trust Co., 67 F. 2d 855; Page v. Arkansas Natural Gas Corporation, 53 F. 2d 27, certiorari granted 52 S. Ct. 407, 285 U. S. 532, 76 L. Ed. 927 and affirmed 52 S. Ct. 507, 286 U. S. 269, 76 L. Ed. 1096; Davis v. Davis, 96 F. 2d 512, 68 App. D. C. 240, certiorari granted 58 S. Ct. 944, 304 U. S. 552, 82 L. Ed. 1523, reversed on other grounds 59 S. Ct. 3, 305 U. S. 32, 85 L. Ed. 27, 118 A.R.R. 1518, motion denied 59 S. Ct. 773; Fleming v. Campbell, 83 P. 2d 708; 148 Kan. 516; State v. Randazzo, 300 S. W. 755, 318 Mo. 761; Trustees of Cincinnati Southern Ry. Co. v. McWilliams, 18 Ohio App. 225; Russell v. Fourth Nat. Bank, 31 Ohio C. A. 193.

And is binding on every tribunal dealing with the case except one clothed with power to overrule and finally declare the law to be otherwise. 14

14 Lunn & Sweet Co. v. Wolfman, 167 N. E. 641, 268 Mass. 345; in re Wecker's Estate, 243 N. W. 642, 123 Neb. 504.

It is founded on public policy, in the interest of orderly judicial procedure. 15

15 Turner v. Kirkwood, 62 F. 2d 256, certiorari denied 53 S. Ct. 522, 289 U. S. 724, 77 L. Ed. 1474; Toy Nat. Bank of Sioux City Iowa v. Smith, 8 F. Supp. 638, reversed on other grounds; Hammerstron v. Toy Nat. Bank, 81 F. 2d 628, certiorari denied Toy Nat. Bank v. Mammerstrom, 57 S. Ct. 9, 299 U. S. 546, 81 L. Ed. 402 and Iowa Joint Stock Land Bank v. Hammerstrom, 57 S. Ct. 9, 299 U. S. 546, 81 L. Ed. 402, and Live Stock Nat. Bank v. Hammerstrom, 57 S. Ct. 9, 299 U. S. 546, 81 L. Ed. 402; In re Reamers Estate, 200 A. 35, 331 Pa. 117, 113 A.L.R. 589.

And is of special significance as applied to questions of law as distinguished from decisions on questions of fact. Gypsum Co. v. Columbia Casualty Co., 199 So. 532, 535, 124 Fla. 633. Distinguished from res judicata, and Stare Decisis.

11. The law of the case, res judicata, and stare decisis belong to the same family in that they have in view the termination of controverted questions of fact and law. 17

17 Gypsum Co. v. Columbia Casualty Co., 169 So. 522, 535m k24 Fla. 633; Scott. v. Scotts Bluff County, 183 N. W. 573, 106 Neb. 355; Perkins v. Vermont Hydro-Electric Corp., 177 A. 631, 106 Vt. 367.

The law of the case, however, is distinct from res judicata. 18

18 Southern R. Co. v. Clift, 43 S. Ct. 126, 260 U. S. 318, 67 L. Ed. 283, (note 18 34 C. J. p. 747 note 92 (a).) in that the law of the case does not have the finality of the doctrine of res judicata, 19 (19 Walker v. Gerli, 12 N. Y. S. 2d 942, 257 App. Div. 249, vacated, 14 N. Y. S. 2d. 278, and re Reamer's Estate, Supra) and applies only to the one case whereas res judicata forecloses parties or privies in one case by what has been done in another case. 20

20 Although in its essence it is nothing more than a special and limited application of the doctrine of res judicata or former adjudication. 21

21 Gypsum Co. v. Columbia Casualty Co., 169 So. 532, 124 Fla. 633.) and what is known as the "law of the case," that is, the effect and conclusiveness of a former decision in the subsequent proceedings in the same case, has been generally put upon the ground of res judicata. 22

22 Petition v. Reader, App., 89 P. 2d 654; Williams Realty & Loan Co. v. Simmons, 3 S. E. 2d 580, 188 Ga. 184; Simmon v. Williams Realty & Loan Co., 194 S. E. 356, 185 Ga. 154; Dixon v. Reddle, 38 S. W. 2d 715, 238 Ky. 722; Darling v. Abbott, 191 N. W. 20, 221 Nich. 449; State v. Randazzo, 300 S. W. 755; 318 Mo. 761; In re Wecker's Estate, 243 N. W. 642, 644, 123 Neb. 504; Venus Shoe Corp. v. Hanover Shoe Store, 189 A. 352, 88 N. H. 478; In re Gould's Estate, 113 A. 552, 270 Pa. 535, 34 C. J. p. 748 note 97.

Such a decision, as the law of the case, is binding on the courts. 27

27 U. S. for use and benefit of John v. Morley Const. Co., 17 F. Supp. 378, modified on other grounds U. S. ex rel Johnson v. Morley Const. Co., 98 F. 2d 781, certiorari denied Maryland Casualty Co. v. U. S. for use and benefit of Harrington, 59 S. Ct. 244; Hamrick v. Stewart, 114 S. E. 723, 29 Ga. App. 220; Levine v. Levine, 252 P. 972, 121 Or. 44; Chase Nat. Bank of City of New York v. Carver, 2 N. Y. S. 2d 329, 166 Misc. 708; Grogan-Cocran Lumber Co. v. McWhorter, Civ. App. 15 S. W. 2d 126, error refused; McHenry v. Banker's Trust Co., Civ. App., 206 S. W. 560, error dismissed 41 Sup. Ct. 321, 255 U. S. 559, 65 L. Ed. 785; Moore v. Sacajawea Lumber & Shingle Co., 256 P. 331, 144 Wash. 38.) as well as on the parties. 28

28 Union Electric Light & Power Co. v. Snyder Estate Co., 15 F. Supp. 379; Roles v. Edwards, 176 S. E. 106, 49 Ga. App. 527; Hamrick v. Stewart, 114 S. E. 722, 29 Ga. App. 220; In re Wecke Estate, 243 N. W. 642, 645, 122 Neb. Levine v. Levine, 252 P. 972, 121 Or. 44; 15 C. J. p. 962 note 37 (a) and even though the decision was erroneous it cannot be availed of by the litigant prejudicially affected in a subsequent trial of the same cause, 29 (29 O'Neil Engineering Co. v. City of Lehigh, 182 P. 659, 75 Okl. 227).

District Court must follow law of its Circuit.

Bausch & Lomb Optical Co. v. Wahlgrenn, 1 F. Supp. 799, affirmed, C.C.A. Wahlgren v. Bausch & Lomb Optical Co., 68 F. 2d 660, certiorari denied 54 S. Ct. 774, 292 U. S. 639, 78 L. Ed. 1491, rehearing denied 54 S. Ct. 862, 292 U. S. 615, 78 L. Ed. 1491; Mobley v. J. A. Fischer Co., 49 F. 2d 920.

12. 21 C. J. S., Section 198, at page 348. Note 20.

In the federal courts a decision of the circuit court of appeals is binding on the district courts in its circuit for the propositions which it decided. 20

20 Edelmann & Co. v. Triple A. Specialty Co., 88 F. 2d 852, certiorari denied 57 S. Ct. 673, 300 U. S. 680, 81 L. Ed. 884; The M. M. O'Brien, 60 F. 2d 976; The Philip J. Kenny, D.C.N.J. 57 F. 2d 335; Cleaves v. Peterboro Basket Co., 54 F. 2d 101; First Trust Co. of Omaha v. Allen, 51 F. 2d 1069; affirmed 60 F. 2d 812, certiorari denied Doolittle v. Allen, 53 S. Ct. 315, 287 U. S. 671, 77 L. Ed. 578; Mobley v. J. A. Fischer Co., 49 F. 2d 920; Palmer v. Bender, 49 F. 2d 316; affirmed 57 F. 2d 32 certiorari granted 53 S. Ct. 79, 287 U. S. 586, 77 L. Ed. 512, affirmed 53 S. Ct. 225, 287 U. S. 551, 77 L. Ed. 489; Western Electric Co. v. Wallerstein, 48 F. 2d 268; D. L. Flack & Son v. West Virginia Coal Co., 46 F. 2d 177, affirmed 50 F. 2d 1075; In re King, 46 F. 2d 112; Hartford & New York Transp. Co. v. Rogers & Hubbard Co., 40 F. 2d 957, affirmed 47 F. 2d 189, certiorari denied Rogers & Hubbard v. Hartford & New York Transp. Co., 51 S. Ct. 483, 283 U. S. 835, 75 L. Ed. 1446; Lektophone Corp. v. Miller Bros. Co., 37 F. 2d 580, reversed on other grounds 51 S. Ct. 93, 282 U. S. 168, 75 L. Ed. 274 amended 51 S. Ct. 178; Sugarland Industries v. Bass, 36 F. 2d 375, reversed on other grounds Bass v. Sugarland Industries, 50 F. 2d 424; In re United Realty & Homebuilders' Corp., 27 F. 2d 138; U. S. ex rel. Hughes v. Gault, 13 F. 2d 225; In re Grossberg, 11 F. 2d 329; McNeely v. Town of Vidalia, 6 F. 2d 21, modifying and making injunction permanent, 6 F. 2d 19, and affirmed Town of Vidalia v. McNelly, 47 S. Ct. 758, 274 U. S. 676, 71 L. Ed. 1292; Morgan v. Tennessee Valley Authority, 28 F. Supp. 732; U. S. v. La Vine, 28 F. Supp. 113; U. S. v. Aluminum Co. of America, 26 F. Supp. 315; Sheldon v. Metro-Goldwyn Pictures Corp.,

26 F. Supp. 134; Bank of New York & Trust Co. v. U. S., 25 F. Supp. 314; Cookson v. Louis Marx & Co., 25 F. Supp. 615; In re James Butler Grocery Co., 22 F. Supp. 995; O. D. Jennings & Co. v. Maestri, 22 F. Supp. 980, affirmed 97 F. 2d 679; Diatel v. Gleason, 22 F. Supp. 355; In re Davis, 22 F. Supp. 2; English v. Bitgood, 21 F. Supp. 641; Baker v. U. S., 21 F. Supp. 577; Forrest v. Southern Ry. Co., 20 F. Supp. 851; Helmbright v. John A. Gebelein, Inc., 19 F. Supp. 621; Koppers Connecticut Coke Co. v. James McWilliams Blue Line, 18 F. 2d 865; certiorari denied James McWilliams Blue Line v. Koppers Coke Co., 58 S. Ct. 25, 302 U. S. 706, 82 L. Ed. 545; U. S. Ex rel Amato v. Commissioner of Immigration Ellis Island New York Harbor, 18 F. Supp. 480; Murphy v. Dunklin County, 17 F. Supp. 128; Campbell v. Lago Petroleum Corp., 16 F. Supp. 980; Remington Rand v. Lind, 16 F. Supp. 666; U. S. v. Hartford Accident & Indemnity Co., 15 F. Supp. 791; In re Lehrenkraus, 14 F. Supp. 682; In re Ruckman, 13 F. Supp. 992; In re Cheney Bros., 2 F. Supp. 605; G. B. R. Milling Co. v. Thomas, 11 F. Supp. 833, Neild Mfg. Corp. v. Hassett, 11 F. Supp. 642; In re Consolidation Coal Co., 11 F. Supp. 594, appeal dismissed, Daersam v. Consolidation Coal Co., 79 F. 2d 989; McNary v. Guaranty Trust Co. of New York, 6 F. Supp. 616; Lawrence v. Travelers Ins. Co., 6 F. Supp. 628; Irving Trust Co. v. Manufacturers Trust Co., 6 F. Supp. 185; Motor Improvements v. A. C. Spark Plug Co., 5 F. Supp. 712, reversed on other grounds, 80 F. 2d 385 certiorari denied A. C. Spark Plug Co. v. Motor Improvements, 56 S. Ct. 939, 298 U. S. 671, 80 L. Ed. 1194; In re Sollars, 5 F. Supp. 483; Mills Novelty Co. v. Bolan, 3 F. Supp. 968; affirmed Mills Novelty Co. v. O'Ryan, 68 F. 2d 1009, certiorari granted O'Ryan v. Mills Novelty Co., 54 S. Ct. 692, 292 U. S. 615, 78 L. Ed. 1474, reversed on other grounds 54 S. Ct. 779, 292 U. S. 609, 78 L. Ed.

1469; Bausch & Lomb Optical Co. v. Wahlegren, 1 F. Supp. 799, affirmed Wahlegren v. Bausch & Lomb Optical Co., 68 F. 2d 660, certiorari denied 54 S. Ct. 774, 292 U. S. 639, 78 L. Ed. 1491, rehearing denied 54 S. Ct. 862, 292 U. S. 615, 78 L. Ed. 1491; U. S. v. McGovern, 1 F. Supp. 568, affirmed 60 F. 2d 880, certiorari denied McGovern v. U. S. 53 S. Ct. 96, 287 U. S. 650, 77 L. Ed. 561; Radio Corporation of America v. Radio Engineering Laboratories, 1 F. Supp. 65, reversed on other grounds 66 F. 2d 768, certiorari granted 54 S. Ct. 373, 290 U. S. 624, 78 L. Ed. 544; Prudential Ins. Co. of America v. Herold, D. C. N. J. 247 F. 681; Jellison v. Krell Piano Co., 246 F. 509; U. S. v. River Spinning Co., 243 F. 759, affirmed 250 F. 586; Mark Seong v. U. S., 242 F. 496, 155 C.C.A. 272, Motifying Ex parte Chin Him, 227 F. 131.

13. The adjudication on the 2d Appeal No. 8027, C.C.A. 3d C. is the "Law of the Case" the propositions decided and the Evidence presented are substantially the very same.

5 Corpus Juris Secundum. APPEAL AND ERROR, p. 1267, Sec. 1821.

Former Decisions as the Law of the Case in General. (Head Note.)

a. Statement of Rule.

As a general rule, an adjudication on the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.

It may be stated as a rule of general application that, where the evidence on a second or succeeding appeal is substantially the same as that on the first or preceding

appeal, all matters, questions, points, or issues adjudicated on the prior appeal are the laws of the case on all subsequent appeals and will not be reconsidered or readjudicated therein. 51

51 Messenger v. Anderson, 32 S. Ct. 739, 225 U. S. 436, 56 L. Ed. 1152; Claiborne-Reno Co. v. E. S. DuPont de Nemours & Co., 77 F. 2d 565; General Motors Acceptance Corp. v. Mid-West Chevrolet Co., 74 F. Ed. 386; Chesapeake & O. Ry. Co. v. Mears, 70 F. 2d 490, certiorari denied 55 S. Ct. 69; Jones v. Box Elder County, Utah, 67 F. 2d 900; Keeler v. Fred T. Ley, 7 Co., 65 F. 2d 499; Surick General Accident & Liability Ins. Co. v. O'Keefe, 64 F. 2d 768, certiorari denied 54 S. Ct. 49, 290 U. S. 630, 78 L. Ed. 548; Armour Fertilizer Works v. Sanders, 63 F. 2d 902, certiorari denied Sanders v. Fertilizer Works, 54 S. Ct. 345, 290 U. S. 623, 78 L. Ed. 543, affirmed 54 S. Ct. 677, 292 U. S. 190, 70 L. Ed. 1206, 91 A.L.R. 950, rehearing denied 54 S. Ct. 855, 292 U. S. 612, 78 L. Ed. 1472; Aetna Life Ins. Co. v. Wharton, 63 F. 2d 378, certiorari denied 53 S. Ct. 786, 289 U. S. 755, 77 L. Ed. 1500; Utah Power & Light Co. v. Woody, 62 F. 2d 613; Freeman v. Smith, 62 F. 2d 291; Northern Pac. Ry. Co. v. Van Dusen Harrington Co., 60 F. 2d 394; International Brotherhood of Electrical Workers Local No. 134 v. Western Union Telegraph Co., 46 F. 2d 736, certiorari denied 52 S. Ct. 13, 284 U. S. 630, 76 L. Ed. 536; National Brake & Electric Co. v. Christensen, 38 F. 2d 721, certiorari denied 51 S. Ct. 36, 282 U. S. 86, 75 L. Ed. 764; Minneapolis Steel & Machinery Co. v. Federal Surety Co., 34 F. 2d 270, affirmed, 22 F. 2d 712; Dodd v. Union Indemnity Co., 32 F. 2d 512, certiorari denied 50 S. Ct. 33, 74 L. Ed. 631; Illinois Cent. Ry. Co. v. Crail, 31 F. 2d 111; affirmed Crail v. Illinois Cent. R. Co., 21 Fed. 836, certiorari granted Illinois Cent. R. Co. v. Crail, 49 S. Ct.

483, 279 U. S. 833, 73 L. Ed. 982, reversed on other grounds, 50 S. Ct. 180, 281 U. S. 57, 74 L. Ed. 699, 67 A.L.R. 1423; Pennsylvania Mining Co. v. United Mine Workers of America, 28 F. 2d 851, certiorari denied 49 S. Ct. 263, 279 U. S. 841, 73 L. Ed. 987; City and County of Denver v. Denver Tramway Corp., 23 F. 2d 287, certiorari denied, 49 S. Ct. 20, 278 U. S. 616; 73 L. Ed. 539; L. P. Larson, Jr., Co. v. William Wrigley, Jr., Co., 20 F. 2d 830, modifying William Wrigley, Jr., Co. v. L. P. Larson, Jr., Co., 5 F. 2d 731, and certiorari denied 48 S. Ct. 207, 276 U. S. 616; 72 L. Ed. 733, certiorari granted L. P. Larson, Jr., Co. v. William Wrigley, Jr., Co., 48 S. Ct. 157, 275 U. S. 521, 72 L. Ed. 404, motion denied 48 S. Ct. 435, 73 L. Ed. 1018, and reversed in part on other grounds 48 S. Ct. 449, 277 U. S. 97, 72 L. Ed. 800; City of Seattle v. Puget Sound Power & Light Co., 15 F. 2d 794, certiorari denied 47 S. Ct. 456, 273 U. S. 752, 71 L. Ed. 874, and Puget Sound Power & Light Co. v. City of Seattle, 47 S. Ct. 458, 273 U. S. 753, 71 L. Ed. 874; Couteau Trust Co. v. Massachusetts Bonding & Insurance Co., 12 F. 2d 136; Dickinson v. O. & W. Thum Co., 8 F. 570; In re Paramount Publix Corp., 10 F. Supp. 504; Meyer & Chapman State Bank v. First Nat. Bank, 291 F. 42; First Nat. Bank v. Old Dominion Trust Co., 284 F. 128; Canal-Commercial Trust & Savings Bank v. Bank of Plant City, 278 F. 178; Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, 277 F. 171, affirming 276 F. 600, 613, and certiorari denied U. S. Rubber Reclaiming Works v. Philadelphia Rubber Works Co., 42 S. Ct. 187, 257 U. S. 660, 66 L. Ed. 422; Browne v. Thorn, 272 F. 950, certiorari granted 41 S. Ct. 625, 256 U. S. 689, 65 L. Ed. 1172, and affirmed 43 S. Ct. 36, 260 U. S. 137, 67 L. Ed. 171; Keith v. Kilmer, 272 F. 643, certiorari denied Kilmer v. Keith, 42 S. Ct. 51, 257 U. S. 639, 66 L. Ed. 410; Cogswell v. Drennen, 172 F. 289, Petition DISMISSED

Tilton v. Drennen, 42 S. Ct. 53, 257 U. S. 651, 66 L. Ed. 417, rehearing granted 42 S. Ct. 168, 257 U. S. 631, 66 L. Ed. 406, certiorari denied 42 S. Ct. 169, 259 U. S. 657, 66 L. Ed. 428, and appeal dismissed 43 S. Ct. 358, 261 U. S. 424, 67 L. Ed. 823, and reversed on other grounds, 43 S. Ct. 704, 262 U. S. 735, 67 L. Ed. 1206; Rainier Brewing Co. v. Great Northern Pac. S. S. Co., 270 F. 94, affirmed 42 S. Ct. 436, 259 U. S. 150, 66 L. Ed. 868; Chapin-Sacks Mfg. Co. v. Hendler Creamery Co., 267 F. 180, Certiorari denied 41 S. Ct. 62, 254 U. S. 648, 65 L. Ed. 451; Bodkin v. Edwards, 265 F. 621, affirming Edwards v. Bodkin, 267, F. 1004, and affirmed 41 S. Ct. 268, 255 U. S. 221, 65 L. Ed. 595; F. H. Orcutt & Son Co. v. National Trust & Credit Co., 265 F. 267, certiorari denied 40 S. Ct. 584, 253 U. S. 491, 64 L. Ed. 1028. (There are 18 columns of cases cited hereunder. I consider the above cases sufficient in law and therefore I proceed no further with the copying and entering of the remaining cases so cited by the authority. Please see them there under the note cited above. N. J. Curtis, plaintiff-appellant.)

14. 5 C. J. S. p. 1499, Sec. 1964. (Head Note.)

a. In General. The decision of a reviewing court becomes the law of the case as to all matters properly within the scope thereof and controls in all subsequent trials or proceedings.

It is a general rule that the decision of an appellate court is the law of the case in further proceedings in the cause in the trial court. 61

61 City of New York Ins. Co. v. American Co. of Arkansas, 42 S. W. 2d 757, 184 Ark. 426; American Co. of Arkansas v. Wheeler, 36 S. W. 2d 965, 185 Ark. 550; Arkansas

Fuel Oil Co. v. State, 22 S. W. 2d 556, 180 Ark. 765, (several other cases follow here); Shields v. Rancho Buena Ventura, 203 P. 577, 187 Cal. 144; . . .; Greely Loveland Irr. Co. v. Handy Ditch Co., 240 P. 270, 77 Colo. 487; Gray v. Mossman, 99 A. 1062, 91 Conn. 430; Firemen's Ins. Co. v. Oliver, 167 S. E. 99, 176 Ga. 80, reversing 162 S. E. 636; . . .; Vinyard v. North Side Canal Co., 274 P. 109, 47 Idaho 272, appeal dismissed and certiorari denied 50 S. Ct. 67, 280 U. S. 520, 74 L. Ed. 589; . . .; Numerous other cases follow here too many to copy and enter them. See them under note 61.)

And in all subsequent stages of the action or proceeding, 62

62 Morris & Co. v. Alexander & Co., 22 S. W. 2d 552, 180 Ark. 725; Deacon v. Bryans, 298 P. 30, 212 Cal. 87; Oglethorpe University v. City of Atlantic, 178 S. E. 156, appeal dismissed 55 S. Ct. 642; Trenton v. Johnson, 240 P. 859, 41 Idaho 583; Palazzolo v. Sackelt, 236 N. W. 786, 254 Mich. 287; Denny v. Guyton, 57 S. W. 2d 415, 321 Mo. 1115, certiorari denied Guyton v. Denny, 53 S. Ct. 657, 289 U. S. 738; certiorari denied Guyton v. Denny, 53 S. Ct. 657, 289 U. S. 738, 77 L. Ed. 1486; McGraw v. Southern Ry. Co., 184 S. E. 31, 209 N. C. 432; Amerada Petroleum Corp. v. Elliff, 41 P. 2d 85; Rugenstein v. Ottenheemer, 152 P. 215, 78 Or. 371, Ann Case 1917 E953; Public Theatres Corp. v. Carpenter, 56 S. W. 2d 248; Perkins v. Vermont Hydro Electric Corp., 177 A. 631; Kaufman v. Catzen, 130 S. E. 292, 100 W. Va. 79; 4 C. J. p. 1214 note 84).

As in a subsequent suit for the same cause of action, 63.

63 Tally v. Ganahl, 90 P. 1049, 151 Cal. 418) Or on a subsequent appeal in accordance with the rule laid down supra in sections 1821-1834.

24 C. J. S. p. 690, Section 1840.

FORMER DECISION AS LAW OF CASE. (Head Note.)

15. Generally the determination of the appellate court as to all questions within the record which are or might have been raised and decided will be the law of that case in subsequent proceedings in the same case.

It is a general rule that the determination of an appellate court as to all questions within the record which are or might have been raised and decided will be the law of that case in subsequent proceedings in the case, 22.

22 Marron v. U. S., 182 F. 2d 218, certiorari granted 47 S. Ct. 574, 274 U. S. 727, 71 L. Ed. 1313, affirmed 48 S. Ct. 74, 275 U. S. 192, 72 L. Ed. 231 motion denied 48 S. Ct. 206, 72 L. Ed. 1016 (Numerous other cases cited hereunder. See them there under note 22.) Marron v. U. S., supra: Head Note 1. Criminal Law key 1180, 1193.—Decision by appellate court becomes Law of Case on second trial and appeal.

Where the evidence is the same and the charge identical, a final decision by an appellate court establishes the law of the case, which governs on a second trial and on a second appeal.

(1) (at page 219 1st col.) Where the evidence is the same, and the charge identical, a final decision on appeal establishes the rule, or law of the case, which will govern the second trial and the former decision made by this court will be binding no, . . . We conclude at once that the former decision on the same point, made under the same charge on the same evidence forecloses argument.

16. CRIMINAL LAW. 24 C. J. S. p. 690, Sec. 1840.

FORMER DECISION AS LAW OF CASE.

Williams v. State, supra Bricken, Presiding Judge.

This is a companion case to that of Son, alias Spider, Williams Same Appellant v. State (1 Div. 194) 171 So. 386, appeal from Mobile circuit court.

We are informed by counsel in briefs, that the prosecution grew out of the same transaction, and while the offenses charged are different the point of decision and respective insistences of parties are in every respect identical; hence a decision in one case would of necessity be controlling in the other.

This court has considered and determined the companion case, wherein appellant appealed from a judgment of conviction for the offense of murder in the second degree (1 Div. 194), supra.

It appears that every point of decision here presented and insisted upon by counsel for appellant has been passed upon and decided in said companion case, hence, there is no necessity for repetition in the instant case.

In concluding the opinion aforesaid this court stated: "We have carefully considered this record and every question raised and presented. . . ."

17. American Equitable Assur. Co. v. Baily, supra. Court of Appeals of Alabama. Samford, Judge.

This is a companion case to that of American Equitable Assurance Company reported in 221 Ala. 28, 128 So. 225, . . .

By that decision we are bound and we do not go into a consideration of those questions.

18. Sheffield v. Tab et al. Supreme Court of Georgia.

PER CURIAM.

This is a companion case of Sheffield v. Sheffield, 173 S. E. 125, this day decided. The two cases involve the same question and were tried together, but separate and identical verdicts were rendered, and the grounds of the motion for new trial are identical. This case is therefore controlled by the rulings made in the case of Sheffield v. Sheffield.

19. 2 R. C. L. p. 223. APPEAL AND ERROR.

SUCCESSIVE APPEALS.—"LAW OF THE CASE".
Sec. 187. In General.

It may be stated generally that a court of review is precluded from agitating questions which were propounded, considered, and decided on a previous review; the decisions agree that, as a general rule, when an appellate court passes upon a question and remands the cause for further proceedings, the question (s) there settled become the "law of the case" upon a subsequent appeal, 10.

10 Mutual Reserve Fund Life Assoc. v. Ferrenbach, 144 Fed. 342, 75 C.C.A. 304, 7 L.R.A. (N. S.) 1163; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Montgovery v. Gilmer, 33 Ala. 116, 70 Am. Dec. 562; Fortenberry v. Frazer, 5 Ark. 200, 39 Am. Dec. 373; Johnson v. San Francisco Sav. Union, 75 Cal. 134, 16 Pac. 753, numerous other cases are cited thereunder. See them there under note 10. The foregoing authority proceeds further than this. See it there as reported.

20. C. J. S. p. 1275, Sec. 1823. WHERE CASE IS REMANDED. (Head Note.)

After the case is remanded, the court on a second appeal

will consider only those questions arising subsequently to the remand or which were not adjudicated in the former determination.

In accordance with the general rule stated in Sec. 1821 where, after a definite determination the court has remanded the cause for further action below, it will refuse to examine questions other than those arising subsequently to such determination and remand, or other than the propriety of the compliance with its mandate, 76.

76 Steinfeld v. Zeckendorf, 36 S. Ct. 14, 239 U. S. 26, 60 L. Ed. 125, affirming Zeckendorf v. Steinfeld, 138 P. 1044, 15 Ariz. 335; Jones v. Box Elder County, Utah, 67 F. 2d 900; American Surety Co. of New York v. Greek Catholic Union, 51 F. 2d 1050, certiorari granted 52 S. Ct. 41, 284 U. S. 608, 76 L. Ed. 520, and reversed on other grounds 52 S. Ct. 235, 284 U. S. 563, 76 L. Ed. 490, amended 52 S. Ct. 392, 285 U. S. 526, 76 L. Ed. 923; Lederer v. Real Estate Title Ins. & Trust Co. of Philadelphia, 273 F. 933 (numerous other cases from State Courts follow here, too many to copy them and enter them here. See them in the C. J. S. on p. 1276).

And if the court below has proceeded in substantial conformity to the directions of the appellate court, its action will not be questioned on a second appeal (citations). However, . . . if the lower court misconstrues the degree of the appellate court and does not give full effect to its mandate, 79 (79 Continental Commercial Trust Savings Bank v. North Platte Valley Ser. Co., 237 F. 188, 150 C. C. A. 334; 4 C. J. p. 1099 note 4) a new appeal is an appropriate remedy.

COMMERCIAL UNION OF AMERICA, INC. v. ANGLO-SOUTH AMERICAN BANK, LTD., C.C.A. 2d. 1925, 10 F. 2d. 937.

1. Courts Key 99 (2)—Order of judge denying motion to dismiss complaint became the law of the case and should be so treated by any other judges sitting in same case in that court.

Where District Judge denied motion to dismiss complaint, his decision was the law of the case as established in District Court, and should have been so treated by any other judge sitting in same case in that court; hence later order of different judge dismissing complaint was improper.

2. Courts Key 481—Judges of co-ordinate jurisdiction, sitting in same court and case, should not overrule decisions of each other.

Judges of co-ordinate jurisdiction, sitting in the same court and in the same case, should not overrule the decisions of each other.

In Error to the District Court of the United States for the Southern District of New York.

Action by the Commercial Union of America, Inc., against the Anglo-South American Bank, Limited. Judgment denying application to amend complaint, and granting motion to dismiss complaint, and plaintiff brings error. Reversed, with directions. . . .

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff is a corporation organized and existing under the laws of the State of New York. The defendant was and is a corporation organized and existing under the laws of the United Kingdom of Great Britain. It is a foreign bank transacting business within the State of New York under a license from the state superintendent of banks.

The action was brought to recover damages in the sum of $21,042.97, with interest and costs, for the alleged breach by

defendant of a contract expressed in a commercial credit issued by the defendant on October 22, 1920, for the sum of $44,800. . . .

It appears that, prior to the order dismissing the complaint on the ground of its insufficiency, which order, as stated, was made on November 24, 1924, a similar motion to dismiss for like reason had been made before Judge Mack, sitting in the District Court, and he denied the motion by an order made on February 14, 1922. It was thereby decided that the complaint was sufficient; the motion to dismiss being equivalent to a demurrer.

The first order is in the record, which the attorneys on both sides stipulate is a true transcript of the record in the action; and the facts are fully recited in the agreed "statement" prepared in accordance with Rule 26 of the District Court Rules. The situation presented, therefore, is this: That after one judge sitting in the case had decided the complaint to be sufficient, another judge sitting in the same court decided it was insufficient and dismissed it.

We are not aware that it has ever before happened that in the Southern District of New York, or in any district within this circuit, one judge has in effect undertaken to set aside or ignore an order made by another judge of co-ordinate jurisdiction in the same suit. It is contended by the plaintiff that the order first made, sustaining the sufficiency of the complaint, rendered the question res judicata as between the parties, and was the law of the case, binding upon the other judges of the court.

In Roberts & Co. v. Buckley, 145 N. Y. 215, 229, 39 N. E. 966, 970, Judge O'Brien, writing for the New York Court of Appeals, said:

"But it is said that this court in the Second division took a different view of the effect of the inventory in deciding the former appeal, and that we are bound by that decision.

If the facts then and now are identical, it is our duty to follow the former decision, even though convinced, if the case was res nova, that our brethren of the Second division took an erroneous view of the law. It is necessary to adhere to this principle if there is ever to be an end to litigation. It is important, of course, that private controversies should be determined in the court of last resort according to law and justice; but the infirmities of human judgment are such that different tribunals will not always take the same view of the question. When, however, the question has been once decided in this court, or in the Second division, with co-ordinate powers, the same parties, in the same case, upon the same facts, cannot be permitted to reopen the discussion without great detriment to the public interest and destroying that respect for the decisions of courts which it is important should it be maintained. (Cluff v. Day, 141 N. Y. 580 (36 N. E. 182); Mygatt v. Coe, 142 N. Y. (36 N. E. 870); Moore v. Simmons, 133 N. Y. 695 (31 N. E. 513)."

And in Matter of Laudy, 161 N. Y. 429, 434, 435, 55 N. E. 914, 915, Judge Vann, writing for the same court, said:

"The principle established in all jurisdictions is that so long as the facts remain the same, the rule of law once held by the court of last resort remains the rule throughout the subsequent history of the cause, in all its stages, except under extraordinary circumstances, which do not exist in this case. 2 Van Fleet's Former Adjudication, 1302, and cases cited. Where the law of a case was determined after full argument and consideration, by the Second Division of this court, and upon a second appeal substantially the same facts appeared, we refused to consider the questions of law and held the parties concluded by the former decision. Cluff v. Day, 141 N. Y. 580 (36 N. E. 182). That there is a question of fact in this case is res judicata. The rule of res judicata controls the parties, while that of stare decisis guides the courts."

In Appleton v. Smith, 1 Fed. Cas. 1075, Fed. Cas. No. 498, Justice Miller (of the Supreme Court), sitting as a Circuit Justice in the District of Arkansas, in 1870, had before him a motion to quash an attachment levied on goods. He denied the motion, and in doing so said:

"Upon looking into the record of the case, I find that the same motion, based upon the same legal proposition, was made at the last term of the court, and was overruled by the last district judge, who at that time held the court. I have repeatedly decided in this circuit, since I was first assigned to it, that I would not sit in review of the judgments and orders of the court, made by the District Judges in my absence. Where, as in the present case, the motion is made on the same grounds, and with no new state of pleadings or facts, it is nothing more than an appeal from one judge of the same court to another, and though it is my province in the Supreme Court to hear and determine such appeals, I have in this court no such prerogative.

The district judge would have the same right to review my judgments and orders here as I would have in regard to his. It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence, and might lead to unseemly struggles to obtain a hearing before one judge in preference to the other. I have also held, and have prescribed it for myself as a rule of conduct, that the presence of the District Judge, and his consent to a review of his decision, will not vary the course to be pursued."

In United States v. Biebusch, 1 F. 213, 1 McCrary 43, Judge McCrary sitting as a Circuit Judge in 1880, said:

"In this case and one other I have at this time heard, with the District Judge, motions for new trials in cases tried before him when holding alone the Circuit Court. I have done so at his request, and only for the purpose of advising

with and assisting him. It is well settled in this circuit that the rulings of the District Judge while holding the Circuit Court are not subject to be reviewed in the same court, either by the Circuit Judge or the Circuit Justice. I make this announcement so that it may be understood that I am not to be expected, as a rule, to entertain motions for new trials in cases tried in my absence by the District Judge, and that I will only sit with the District Judge in hearing such matters when he desires and requests it. It is not enough that he does not object or consent."

In Cole Silver Mining Co. v. Virginia & Gold Hill Water Co., 6 Fed. Cas. No. 2, 990, Mr. Justice Field (of the Supreme Court), sitting in the Circuit Court, said:

"II. The injunction, although preventive in form, is undoubtedly mandatory in fact. It was intended to be so by the Circuit Judge who granted it, and the objection which is now urged for its dissolution was presented to him, and was fully considered. I could not with propriety reconsider his decision, even if I differed from him in opinion. The Circuit Judge possesses, as already stated, equal authority with myself in the circuit and it would lead to unseemly conflicts, if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case."

In Ogley v. Attrill, 14 F. 214, Judge Pardee, sitting in the Circuit Court for the Eastern District of Louisiana, in 1882, was asked to set aside a substituted service of process. He said:

"I have examined the record, and I find that this question has been passed upon and adjudicated by the District Judge sitting in this court in the early stage of this case. 12 Fed. Rep. 227. This decision is not open for review to any other judge sitting in this court in the same case."

In Reynolds v. Iron Silver Mining Co., 33 Fed. Rep. 354,

Justice Brewer (of the Supreme Court), sitting in the Circuit Court in Colorado in 1888, was asked to dissolve an injunction which had been granted by another judge of the court. He declined to do it, and, after referring with approval to what was said by Justice Miller in Appleton v. Smith, supra, and by Judge McCrary in United States v. Biebusch, supra, went on to say:

"You all know, at least those who have been familiar with the jurisprudence of the State of New York, how many unseemly struggles there have been, as Justice Miller refers to, to get a case now before one judge, and then before another. Under their peculiar system, you get an order before one judge; the beaten party goes to another judge, gets an order staying proceedings, and sets down a motion before a third to vacate the order, and one never knows when the litigation is at an end, or where it is to continue; whereas, if it is all continued before the same judge from the commencement to the close, there is a consistency in the rulings, if nothing else; and I think that the orderly administration of justice requires, and justice itself will in the long run and the general average be best secured, if litigation commenced before one judge continues before him until it shall be taken to an appellate tribunal."

In Wakelee v. Davis, 44 F. 532, Judge Coxe, sitting in the Circuit Court for the Southern District of New York in 1891, in a case which had been twice before the court on demurrer, said:

"The propositions of law presented are the same now as on demurrer. Some testimony has been taken pro and con, but, upon all important questions, it is substantially conceded that the legal aspects of the cause remain unchanged. It is true that in deciding the issues presented by the demurrer the court spoke through another judge, but the law there enunciated is not merely the individual opinion of the

judge who presided; it is the law of this court, to be followed, upon similar facts, until a different rule is laid down by the Supreme Court. A re-examination and discussion of the question involved is, therefore, unnecessary, for the reason that the court is constrained to follow its former decision."

In Shreve v. Cheesman, 69 F. 785, 790, 16 C.C.A. 413, 418, Judge Sanborn, writing for the Circuit Court of Appeals in the Eighth Circuit, in 1895, said:

"It is a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. This principle is nowhere more firmly established or more implicitly followed than in the Circuit Courts of the United States. A deliberate decision of a question of law by one of these courts is generally treated as a controlling precedent in every federal Circuit Court in the Union, until it is reversed or modified by an appellate court. Striking illustrations of this principle will be found in Culcanite Co. v. Willis, 1 Flip. 389, 393, Fed. Cas. No. 5,606, in which Judge Emmons said of these courts: 'They constitute a single system; and when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demand it should be followed until modified by the appellate court. * * *So great, however, is the importance I attach to uniformity of decision by courts of co-ordinate jurisdiction, that I feel constrained to adopt the rule thus established in the several districts in which these cases arose. It seems more important that the rule should be uniform and certain than that it should be consistent with principle'; Welle v. Navigation Co. (C. C.), 15 F. 561, 570; Reed v. Railroad Co. (C. C.), 21 F. 283; American Wood Paper Co. v. Fiber Disintegrating

Co., 3 Fish. Pat. Cas. 362, Fed. Cas. No. 320; Goodyear v. Berry, 3 Fis. Pat. Cas. 439, Fed. Cas. No. 5,556; Machinery Co. v. Knox (C. C.), 39 F. 702. Nor has it been thought less vital to a wise administration of justice in the federal courts that the various judges who sit in the same court should not attempt to overrule the decisions of each other, especially upon questions involving rules of propriety or of practice, except for the most cogent reasons."

In Taylor v. Decatur Co., 113 F. 449, District Judge Toulmin, sitting in the Circuit Court for the Northern District of Alabama, in 1901, said:

"Such of the demurrers as are filed to the original bill, and which were heretofore considered and overruled by Judge Swayne, then presiding in this court, are not passed on by me further than pro forma to overrule them, as having been ruled on by this court. One judge will not review the rulings of another in the same court."

In Plattner Implement Co. v. International Harvester Co. of America, 133 F. 376, 66 C.C.A. 438, a general demurrer was interposed to an answer and was sustained by the resident District Judge. The defendant thereupon filed an amended answer, and the plaintiff filed a reply to that answer. There was a trial before a jury and the District Judge of another district, who was temporarily holding the court. The trial judge directed a judgment for the defendant upon a defense, although the resident judge had previously sustained the demurrer to it. Judge Sanborn, writing for the Circuit Court of Appeals for the Eighth Circuit, in considering the action of the trial judge, after referring to the rule laid down in Shreve v. Cheesman, supra, and referring to it as a "rule of comity and of necessity," said:

"But the rule itself, and a careful observance of it, are essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respectable ad-

ministration of the law, especially in the national courts, where many judges are qualified to sit at the trials, and are frequently called upon to act in the same cases. It is unavoidable that the opinions of several judges upon the many doubtful questions which are constantly arising should sometimes differ, and a rule of practice which would permit one judge to sustain a demurrer to a complaint, another of co-ordinate jurisdiction to overrule it and to try the case upon the theory that the pleading was sufficient, and the former to then arrest the judgment, upon the ground that his decision upon the demurrer was right, would be intolerable. It has long been almost universally observed."

In Presidio Mining Co. v. Overton, 261 F. 933, decided by the Circuit Court of Appeals in the Ninth Circuit, it quoted approvingly the remarks of Justice Field in Cole Silver Mining Co. v. Virginia & Gold Hill Water Co., supra, already set forth in this opinion.

We have at some length set forth the rulings of the federal courts on the effect of a decision made by a trial judge upon the right of a judge sitting subsequently in the same court and in the same case to overrule the decision of the first judge on the same matter. We have done so because the question raised is important, and has to do with the dignified and orderly procedure of the courts, and is a departure from what has been regarded heretofore in this and in the other circuits as improper and not to be countenanced.

The learned judge who first passed on the sufficiency of the complaint, and held it to be sufficient, denying the motion to dismiss, filed no opinion; and the learned judge who subsequently sat in the case, in the same court, held the same complaint insufficient and dismissed it, and also wrote no opinion, but in denying the motion to amend the complaint to the complaint, if allowed, would not cure the infirmity.

Old Colony Trust Co. v. L. T. & T. Co., 297 F. 152. Motion denied."

(1, 2). It appears, therefore, that in dismissing the complaint, he thought the decision of this court in the Old Colony Trust Co. Case, and handed down after Judge Mack had made the original order sustaining the sufficiency of the complaint, was erroneous in law, ought to be disregarded by him, and required the dismissal of the action. In so holding we think he made a serious mistake, quite irrespective of whether or not the Old Colony Trust Co. Case was correctly construed by him. The counsel for the plaintiff in error insists that that case is plainly distinguishable from this in its facts, and is not at all governed by it. We shall not pass upon that question at this time, but content ourselves with holding that the decision made by Judge Mack was the law of the case as established in the District Court, and should have been so treated by any other judge sitting in the same case in that court. Judges of co-ordinate jurisdiction, sitting in the same court and in the same case, should not overrule the decisions of each other.

For that reason and that reason only, the judgment is reversed, and the District Court is directed to reinstate the action and grant the motion to amend the complaint.

HYDE AND SCHNEIDER v. UNITED STATES, 225 U. S. 347.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

(1) In this case the defendant applied for a writ of certiorari and the Attorney General assented to granting it on the ground that the determination of the case depends upon

the principles of law governing conspiracy and it is of vital importance to the United States, as well as its citizens, to have those principles settled by this court.

(2) While under the ancient rule of conspiracy the gist was the conspiracy itself and the crime was complete without any overt act, Sec. 5440, Rev. Stat. prescribes as necessary to constitute an offense under it not only the unlawful conspiracy but also an overt act to effect the object by at least one of the conspirators.

(3) Quaere as to the extent of agency between persons conspiring in violation of Sec. 5440, Rev. Stat.

(4) There may be a constructive presence in a State, distinct from personal presence, by which a crime committed in another State may be consummated, and render the person consummating it punishable at that place.

(5) In construing criminal laws, courts must not be in too great solicitude for the criminal to give him immunity because of the difficulty in convicting or detecting him.

(6) In determining the place of trial there is no oppression in taking the conspirators to the place where the overt act was performed rather than compelling the victims and witnesses to go to the place where the conspiracy was formed.

(7) The size of our country has not become too great for the effective administration of criminal justice.

(8) Where a continuing offense is committed in more than one district, the Sixth Amendment does not preclude a trial

in any of those districts. Armour Packing Co. v. United States, 209 U. S. 56.

(9) Overt acts performed in one district by one of the parties who had conspired in another district in violation of Sec. 5440, Rev. Stat., give jurisdiction to the court in the district where the overt acts are performed as to all the conspirators. Brown v. Elliott, p. 392, post (in the report); United States v. Kissel, 218 U. S. 601, followed to the effect that a conspiracy under 5440, Rev. Stat. may be continuing one, and that the offense is not barred on the expiration of the period from the date of the conspiracy itself.

(10) The fact that one of the conspirators was the servant of another conspirator does not preclude there being a conspiracy between them, and, until there is an affirmative withdrawal from the conspiracy by the servant, his acts bind his employer and co-conspirator so far as preventing the statute of limitations from running.

(11) Until a conspirator affirmatively withdraws from a continuing conspiracy there is conscious offending that prevents the statute from running.

(12), (13), et seq. left out. See them in the Reported Case.

Mr. Justice McKenna delivered the opinion of the court. At p. 355.

The case is here on certiorari.

The Attorney General assented to the granting of the writ, he saying that "the determination of this case depends upon the principles of law governing conspiracies," and that in view of the decisions of the lower courts and of the numerous prosecutions under the conspiracy statute, "it was of vital importance to the United States, as well as to its citizens, that these principles be definitely settled by this court."

The petitioners asked the court to review the case for the purpose of having it decide certain questions of law which they characterized as "important and fundamental" one of which, counsel says, granting the writ took out of the case. Of those remaining one is "as to the effect of an overt act in giving jurisdiction in an indictment for conspiracy under section 5440," and the other is "as to the effect of overt acts by some of the accused in depriving the petitioners of the benefit of the statute of limitations."....

First, as to the overt acts in giving jurisdiction:

It will be observed that the indictment charges that the conspiracy was formed in the District of Columbia and that certain of the overt acts were performed there and others in California.

"If these defendants got together in California and planned to defraud the United States out of its lands by the means charged in the indictment, and in pursuance of that plan sent Dimond here to get the titles from the Government, they were acting within the District of Columbia as much as if they had come and done the thing themselves." And subsequently the United States Attorney assented to the proposition that the Government could not prevail except on the theory that it was sufficient to show an overt act in the District of Columbia, and the court said "that if that theory was wrong, of course they failed."

The question, therefore, is presented as to the venue in conspiracy cases, whether it must be at the place where the conspiracy is entered into or whether it may be at the place where the overt act is performed, the Sixth Amendment of the Constitution of the United States requiring all criminal prosecutions to be in the "district wherein the crime shall have been committed."

The crime of conspiracy is defined by Sec. 5440 of the Revised Statutes as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

It is contended by the defendants that the conspiracy—the union in an unlawful purpose—constitutes the crime and that the requirement of an overt act does not give the offense criminal quality or extent, but that the provision of the statute in regard to such act merely affords an opportunity to withdraw from the design without incurring its criminality (called in the cases a locus penitentiae).

But we think the argument insists too exactly on the ancient law of conspiracy, and does not give effect to the change made in it by §5440, supra. It is true that the conspiracy, the unlawful combination, has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act, but Sec. 5440 has gone beyond such rigid abstraction and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an "act to effect" its object, and provides that when such act is done "all the parties to such conspiracy" become liable. Interpreting the provision, it was decided in Hyde v. Shine, 199 U. S. 62, 67, that an overt act is necessary to complete the offense. And so it was said in United States v. Hirsch, 100 U. S. 33, recognizing that while the combination of minds in an unlawful purpose was the foundation of the offense, an overt act was necessary to complete it. It seems like a contradiction to say that a thing is necessary to complete another thing and yet that other thing is complete without it. It seems like a paradox

to say that anything, to quote the Solicitor General, "can be a crime of which no court can take cognizance." The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction.

A question may be raised as to the extent of the agency between conspirators, but we need not enter into that broad inquiry. As far as the case at bar is concerned, may be admitted that the act must have the conspiracy in view and have some power to effect it. In the present case the field of operation and its consummation were to be and were in the States of California and Oregon and in the District of Columbia, where the General Land Office is situated. The action of the latter was to be induced or influenced, and this might be through deception, it might be through fraud, or it might be through innocent agents and acts of themselves having no illegality, but effectually causing and moving official action to the consummation of the end designed and contemplated. Overt acts of all these kinds are charged. The bribery and deception of the officers, the intervention of attorneys and the seemingly harmless mailing of information and directions all are charged and all had some relation to the scheme devised and were steps to its accomplishment. The powers of the Land Office were necessarily to be invoked and proceedings therein instituted and prosecuted by acts innocent indeed of themselves, taking only criminal taint from the purpose for which they were done. Indeed, is not this so of acts done in the execution of any crime? Discharging a loaded pistol at a target is an innocent pastime, discharging a loaded pistol at a human being with felonious

intent takes a quality from such intent and may constitute murder.

If the unlawful combination and the overt act constitute the offense, as stated in Hyde v. Shine, marking its beginning and its execution or a step to its execution, Sec. 731 of the Revised Statute must be applied. That section provides that "when any offense against the United States is begun in one judicial district and completed in another it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein." This provision takes an emphasis of signification from the fact that it was originally a part of the same section of the statute which defined conspiracy—that is Sec. 30 of the Act of March 2, 1867, 14 Stat. 484, c. 169. Nor has the provision lost the strength of meaning derived from such association by its subsequent separation, for it is provided in Sec. 5600 of the Revised Statute that "the arrangement and classification of the several sections of the revision have been made for the more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed."

Section 731 was applied in re Palliser (136 U. S. 257) to the offense of unlawfully using the mails. It was decided that an offense committed by mailing a letter was continued in the place where the letter was received, and triable in the District Court of the United States having jurisdiction in such place. The case was cited in Benson v. Henkel, 198 U. S. 1, 15, which was concerned with extradition proceedings against one charged with the crime of bribery, alleged to have been committed by mailing a letter in the State of California, directed to certain officers of the General Land

Office in the District of Columbia. It was objected to the removal of the defendant to the District of Columbia for trial that the crime was committed, if at all, in California. The contention was held untenable under the ruling in In re Palliser. The strong expression of counsel for the defendants may, therefore, be turned from derision of to the support of the view, that crime, even conspiracy, may be carried from one place to another in the "mail pouches." And we may ask in passing, may not a conspiracy be formed through the mails constituted by letters sent by persons living in different States? And, if so formed, we may further ask, to which State would the conspiracy be assigned? In such case must the law come forward with some presumption or fiction, if you please, give locality to an union of minds between men who were never at the same place at the same time? The statute cuts through such puzzles and makes the act of a conspirator, which necessarily has a definite place without the aid of presumption or fiction, the legal inception of guilt inculcating all and subjecting all to punishment.

In re Palliser was also applied in Burton v. United States, 202 U. S. 344, in which it was held that there was jurisdiction in Missouri of a criminal charge against Burton for agreeing in that State to receive prohibited compensation for certain services to be rendered by him while he was a United States Senator, the offer being personally present in the State. The court said through Mr. Justice Harlan (p. 387): "The constitutional requirement is that the crime shall be tried in the State and District where committed, not necessarily in the State or district where the party committing it happened to be at the time. This distinction was brought out and recognized in Palliser's case, 136 U. S. 257."

And, after stating that the agreement between the parties was completed at the time of the acceptance of Burton's

offer at St. Louis, he added: "Then the offense was committed, and it was committed at St. Louis, notwithstanding the defendant was not personally present in Missouri when his offer was accepted and the agreement was completed." And the contention was rejected "that an individual could not, either in law or within the meaning of the Constitution, commit a crime within a State in which he is not physically present at the time the crime is committed."

This court has recognized, therefore, that there may be a constructive presence in a State, distinct from a personal presence, by which a crime may be punished by an exercise of jurisdiction, that is, a person committing it may be brought to trial and condemnation. And this must be so if we would fit the laws and their administration to the acts of men and not be led away by mere "bookish theorick." We have held that a conspiracy is not necessarily the conception and purpose of the moment, but may be continuing. If so in time, it may be in place—carrying to the whole area of its operations the guilt of its conception and that which follows guilt, trial and punishment. As we have pointed out, the statute states what in addition to the agreement is necessary to complete the measure of the offense. The guilty purpose must be put into a guilty act.

We realize the strength of the apprehension that to extend the jurisdiction of conspiracy by overt acts may give to the Government a power which may be abused, and we do not wish to put out of view such possibility. But there are counter considerations. It is not an oppression in the law to accept the place where an unlawful purpose is attempted to be executed as the place of its punishment, and rather conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from theirs. We must not, in too great a solicitude for the criminal, give him a kind of immunity from punishment because of the dif-

ficulty in convicting him—indeed, of even detecting him. And this may result, if the rule contended for be adopted. Let him meet with his fellows in secret and he will try to do so, let the place be concealed, as it can be, and he and they may execute their crime in every State in the Union and defeat punishment in all. And the suppositions are not fanciful, as illustrated by a case submitted coincidently with this. Brown v. Elliott, post, p. 392. The possibility of such a result repels the contention and demonstrates that to yield to it would carry technical rules and rigidity of reasoning too far for the practical administration of criminal justice. We see no reason why a constructive presence should not be assigned to conspirators as well as to other criminals; and we certainly cannot assent to the proposition that it is not competent for Congress to define what shall constitute the offense of conspiracy or when it shall be considered complete and do with it as with other crimes which are commenced in one place and continued in another. Nor do we think that the size of our country has become too great for the effective administration of criminal justice. We held in Armour Packing Company v. United States, 209 U. S. 56, that the transportation of merchandise for less than the published rate is, under the Elins Act, a continuing offense, and that the Sixth Amendment of the Constitution of the United States, providing that an accused shall be tried in the State and District where the crime is committed, did not preclude a trial of the offense in any of the districts through which the transportation was conducted. See also Haas v. Henkel, 216 U. S. 462, 473.

In Robinson v. United States, in the Circuit Court of Appeals of the Eighth Circuit, the question was directly presented. 172 Fed. Rep. 105. The conspiracy passed on was alleged in the indictment to have been entered into in Cincinnati and Chicago, the overt acts set out were proved to have

been committed in Minneapolis and the evidence showed that it was the intention of the conspirators to carry out their conspiracy at Minneapolis. The trial court was moved to direct a verdict for the defendants if the jury found that the agreement was entered into in Cincinnati and Chicago and was complete when the parties went into the district of Minnesota. The instruction was refused and, the defendants having been convicted, the refusal was assigned as error, in the Circuit Court of Appeals, based on the provisions of the Constitution of the United States giving those accused of crime the right to trial by jury of the State and district wherein the crime shall have been committed.

The court, passing on the ruling of the trial court, said by District Judge Carland (p. 108), and we quote its language to avail ourselves not only of the citation of cases, but of the comments upon them.

"To the same effect are Commonwealth v. Gillespie, 7 Serg. & R. (Pa.), 469, 10 Am. Dec. 475; Noyes v. State, 41 N. J. Law, 418; Commonwealth v. Corlies, 3 Brewst. (Pa.), 575.

"If this was the law of venue in conspiracies at common law, where proof of an overt act was not necessary to show a completed offense, the same rule can be urged with much greater force under section 5440, Rev. St. U. S., as the offense described therein for all practical purposes is not complete until an overt act is committed.... It seems clear, then, that whether we place reliance on the common law or on section 731, Rev. St., the venue of the offense was correctly laid in the District of Minnesota, and the evidence sustained the allegation of the indictment."

To the cases cited by the learned court these may be added: State v. Nugent, 77 N.J.L. 84, 86; Bloomer v. State, 48 Maryland, 621; People v. Arnold, 46 Michigan, 268, 275; American Insurance Co. v. State, 75 Mississippi, 24; State

v. Hamilton, 13 Nevada, 386; International Harvester Co. v. Commonwealth, 137 Kentucky, 668, 674; Pearce v. Territory, 11 Oklahoma, 438; Ex Parte Rogers, 10 Tex. App. 655, and Raleigh v. Cook, 60 Texas, 438.

The contention is answered by the views which we have already expressed. As the overt acts give jurisdiction for trial, it is not essential where the conspiracy is formed so far as the jurisdiction of the court in which the indictment is found and tried is concerned. This is established by the cases which have been cited, and the question will be considered further in Brown v. Elliott, and Moore v. Elliott, cases submitted coincidently with this, post, p. 392.

The fifth, sixth, seventh and eighth assignments of error invoke the statute of limitation in behalf of Hyde and Schneider.

The plea of the statute as affected by overt acts was considered in United States v. Kissel, 218 U. S. 601, where it was declared that a conspiracy may be a continuing one, and the doctrine is applicable to the case at bar unless there is something special in the facts regarding Hyde and Schneider which constitutes a defense as to them. This is asserted. It is contended that the relation of Schneider to the conspiracy was only that of one rendering service as a servant of his master (Hyde), in consideration of the salary paid to him by his master, and that he had not within three years before the finding of the indictment participated in any way in the carrying out of the master's scheme, the subject of the conspiracy. And from this it is contended the question arises whether Hyde is not also entitled to the protection of the statute of limitation in so far as he is charged with conspiring with his employe Schneider.

But the fact that a salary was paid by one to another would not preclude a conspiracy between them. It might, indeed, mark a more humble criminal desire, and one which pre-

ferred a certain regard rather than take chances in the success of a criminal enterprise, and it was certainly not inconsistent with a full and active participation in the scheme. Indeed, Schneider, in a confession which we shall presently refer to, stated that a salary and the certainty of employment was his inducement.

The Government contends that there was such participation originally and to a time within the statute, and that there is nothing to show a repudiation of or withdrawal from the conspiracy by him before 1902, when he made a partial disclosure of the conspiracy to the Government.

The court charged the jury in substance that if Schneider had engaged in the conspiracy "back of the three year period" and the conspiracy contemplated that acts should be done from time to time through a series of years until the purposes of the conspiracy should be accomplished, although he, Schneider, did not do anything within the three year period but "remained acquiescent, expecting and understanding" that further acts should be performed, they, if performed, would be his acts "and would have the same effect against him as if he had done them himself. He would still be acting through his colleagues. He might be playing his part by keeping still as much as he did formerly by acting."

The contention of the defendants is that the statute begins to run from the last overt act within three years from the formation of the conspiracy within which there was conscious participation. (Italics ours.) The Government makes the counter contention that however true this may be as to accomplished conspiracies it is not true of one having continuity of purpose and which contemplated the performance of acts through a series of years. And that such a distinction can exist, we have seen is decided and illustrated in United States v. Kissel. And necessarily so. Men may have

lawful and unlawful purposes, temporary or enduring. The distinction is vital and has different consequences and incidents. The conspiracy accomplished or having a distinct period of accomplishment is different from one that is to be continuous. If it may continue it would seem necessarily to follow the relation of the conspirators to it must continue, being to it during its life as it was to it the moment it was brought into life. If each conspirator was the agent of the others at the latter time he remains as agent during all of the former time. This view does not, as it is contended, take the defense of the statute of limitation from conspiracies. It allows it to all, but make its application different. Nor does it take from a conspirator the power to withdraw from the execution of the offense or to avert a continuing criminality. It requires affirmative action, but certainly that is no hardship. Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. And we think, consciously offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence. The successive overt acts are but steps toward its accomplishment, not necessarily its accomplishment. This is the reasoning of the Kissel Case stated in another way. As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance. Until he does withdraw there is conscious offending and the principle of the cases cited by defendants is satisfied.

But it is contended that under the instructions of the court Schneider was involved in criminality by overt acts done not only after he had ceased to be in Hyde's employ-

ment in any capacity, but after he had disclosed that there was a conspiracy against the Government. It was testified by Woodford D. Harlan that disclosure of frauds had come through one J. A. Zabriskie, he, however, knowing nothing about the matters except as informed by Schneider. The matter was referred to an agent who reported conversations with Schneider giving detailed information of the frauds and the manner by which they were accomplished. This report was received at the General Land Office in November, 1902. It does not appear what became of the report. The recollection of the witness was that he saw the report first, and he testified that he took it to the clerk who was distributing the mail, but for what purpose it does not appear. He never saw it again until one day during the trial. He, however, wrote to Benson about it, and after having seen weekly statements of certain special agents who were investigating the Schneider charges, he notified Benson. This seems to have been in March, 1903. Later, in October and November, 1903, he also wrote Benson at the suggestion of Detective Burns.

There are overt acts charged subsequent to the disclosure made by Schneider, and it is contended that by the instruction embodied in the seventh assignment of error Schneider was continued in the conspiracy by overt acts committed after his disclosure to the agent of the Land Department had been communicated to the Commissioner of the General Land Office.

(At p. 376.) "The first question is," the court charged, "Did the defendants conspire at all? The second question is whether they conspired to accomplish the end alleged. The third question is, whether they conspired to accomplish that end by the fraudulent means alleged, so far as the indictment in that respect is necessary to be proved, referring to what has been already stated in that respect. The

fourth question is, under each count, whether the overt act therein mentioned has been proved.

"Two other important questions must be determined in connection with the foregoing: One relating to the place, the other to the time. The conspiracy must have existed in the District of Columbia, and it must have existed and some overt act in pursuance of it must have been committed within three years next before the filing of the indictment."

And, assuming that the conspiracy was established and overt acts in furtherance of it shown in the District of Columbia, the court explained, "the conspiracy is here (the District of Columbia) just as truly as if the defendants were all here in person, doing those things with the common mind and purpose which contemplated them. In such circumstances the defendants would be conspiring together in the doing of each act because each act would have reference to the conspiracy. It would not be necessary that they should put their heads together and go over the terms of the conspiracy every time an act was done in furtherance of it. It would be enough if the act was an expression of their common understanding." Brown v. Elliott.

(At p. 399.) It is charged that on April 5, 1907 (first count), (see the Complaint in this case as to Counts, N. J. Curtis), and on April, 1907 (second count), the appellants and other persons "did then and there" conspire (we omit the adverbs). This might well be contended, so far as removal proceedings are concerned, as an allegation of the formation of the conspiracy in the District of Nebraska, or certainly a distinct and explicit renewal of it. And it would seem like giving technicality too much effect to consider that the agreement made in 1905, rather than its specific and formal renewal in 1907, should determine the jurisdiction of its trial. Besides, its continued existence and operation are alleged, and we have seen if overt acts were done prior to

1907 they may have been done at Omaha and constituted, with those done afterwards, a part of an entire scheme, to be executed by a succession of acts.

It is only by the assumption and insistence that the conspiracy was formed in 1905 that appellants give their contention any foundation whatever. If the conspiracy was formed at Omaha in 1907, upon the supposition that the conspiracy constitutes the offense and the State and district of its origin are the State and district of its trial, the District Court of Nebraska had jurisdiction. This follows, no matter where the overt act was done. We have pointed out, however, that the indictment does not show that the first overt act was done at a place and district unknown. The first overt act may have been performed at Omaha.

If either view, therefore, be accepted, the judgment of the Circuit Court dismissing the petition for habeas corpus must be affirmed.

If, however, we assume with appellants that the indictment charged that the conspiracy was formed in 1905 and at place unknown to the grand jurors, the same result must be pronounced, upon the authority of Hyde v. The United States, just decided, ante, p. 347. We there held that the place of trial could be any State and district where an overt act was performed. And we further held, following United States v. Kissel, 218 U. S. 601, that conspiracy might be a continuous crime. We there said, distinguishing a crime from its results: "But when the plot contemplates bringing to pass a continuing result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one." These remarks are especially pertinent to the case at bar.

It is alleged in the indictment that the conspiracy set forth was designed to be and was continuous, and, being so, every overt act was the act of all the conspirators, made so by the terms and force of their unlawful plot.

In Lanbaugh v. United States, 179 Fed. Rep. 476, the Circuit Court of Appeals for the Eighth Circuit considered the relation of the overt acts to the conspiracy and their effect in determining the application of the statute of limitations. The court said (p. 478), by Mr. Justice Van Devanter, then Circuit Judge: "While the gravamen of the offense is the conspiracy, the terms of section 5440 are such that there also must be an overt act to make the offense complete (Hyde v. Shine, 199 U.S. 62, 76); and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where during the existence of the conspiracy there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found. Lorenz v. United States, 24 App. D. C. 337, 387; S. C. 196 U. S. 640; Ware v. United States, 84 CIC. A. 503, 154 Fed. Rep. 577, 12 L.R.A. (N.S.) 1053, S.C., 207 U.S. 588; Jones v. United States, 89 C. C. A. 303, 162 Fed. Rep. 417; S.C. 212 U. S. 576."

If, however the conspiracies may be regarded as distinct, then one is charged as having been formed at Omaha in April, 1907, and that overt acts were performed there to effect its object within three years of the finding of the indictment, to wit, October 7, 1909. These allegations establish the jurisdiction of the District Court of Nebraska and exclude the application of the statute of limitations.

As the place of the overt act may be the place of juris-

diction, it follows that the exact place where the conspiracy was formed need not be alleged. This case illustrates the evil which a contrary ruling would cause. The place where the conspiracy was formed was unknown to the grand jurors (and might be so in many cases), but it was intended to be executed in a number of States of the Union, and yet, under the rigor of the contention of appellants, the conspirators could not be tried in any of them. In other words, not the place of the activities of the conspiracy and where it incurs guilt, but the place of its formation, which no one may know or can find out, is the place of the jurisdiction of its trial. And what compels this? It is answered: The Sixth Amendment of the Constitution of the United States. We have determined otherwise in Hyde v. United States, ante 347.

The Constitution of the United States is not intended as a facility for crime. It is intended to prevent oppression, and its letter and its spirit are satisfied if where a criminal purpose is executed the criminal purpose be punished. It is there that its victims are sought and defrauded. It is there that its perpetrators should be brought to the bar of justice for their acts; not for the mere conception of them, but for the actual execution of them. The venue of his trial is thus made by the criminal himself, not determined by reasons or interests which may be adverse to him and used to his injury.

U.S.C.A. Tit. 8, Sec. 41. Equal rights under the law.—All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (R. S. Sec. 1977.)

Section 43. Civil action for deprivation of rights.—Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R. S. Sec. 1979.)

Section 47. Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, . . .; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or

Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. Secs. 563, 629.

Title 18 U.S.C.A. 88. Conspiring to commit offense against United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of such conspiracy, each of the parties to such conspiracy shall not more than $10,000, or imprisoned not more than two years, or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1907, c. 321, Sec. 37, 35 Stat. 1069.

Any two or more persons who shall combine, unite, confederate, conspire or bind themselves by oath, covenant, agreement, or other alliance:

a. To commit a crime; or b. Falsely and maliciously to indict another for a crime, or to procure another to be charged or arrested for a crime; or c. Falsely to institute and maintain any suit; or d. To cheat and defraud a person of any property by any means which are in themselves criminal; or e. To cheat and defraud a person of any property by any means which if executed, would amount to a cheat; or f. To obtain money by false pretenses; g. . . .; h. To commit any act for the perversion or obstruction of

justice or the due administration of the laws—shall be guilty of conspiracy and be liable to the same penalty as persons convicted of a misdemeanor (R. S. of New Jersey. Ch. 119. Conspiracy. 2:119-1).

If two or more persons conspire:

(1). To commit a crime; or, (2). Falsely and maliciously to indict or convict another for any crime, or to procure another to be charged or arrested for any crime; or (3). Falsely to move or maintain any suit, action or proceeding; or, (4). To cheat and defraud any person of any property by any means which are in themselves criminal, or by any means which if executed would amount to a cheat, or to the obtaining of money or property by false pretenses; or (5). To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws; they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding $1,000. (R. S. of Utah. Conspiracy. Chapter 11. Criminal Conspiracy Defined.)

U.S.C.A. Title 15, Sec. 1.—Trusts, etc. in restraint of trade illegal; penalty.—Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 3. Trusts in Territories or District of Columbia illegal; penalty.—Combination a misdemeanor. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal.

Section 4. Jurisdiction of Courts, procedure.

The several district courts of the United States are invested with jurisdiction to prevent and restrain violation of Sections 1 to 7, inclusive, or Section 15 of this chapter. July 2, 1890, c. 647, Sec. 4, 26 Stat. 209; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.

Section 5. Bringing in Additional parties.

Whenever it shall appear to the court before which any proceeding under Section 4 of this chapter may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof. July 2, 1890, c. 647, Sec. 5, 26 Stat. 210.

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefore in a district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fees. (Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731.)

Section 24. Liability of directors and agents of corporations.

Whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation.

Section 26. Injunctive relief for private parties; exceptions.—Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws. . . .

U.S.C.A. Title 28, Section 41, subd. (1) last sentence. The foregoing provisions as to the sum or value in the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of the section. R. S. 563; Mar. 3, 1875, Sec. 1, 25 Stat. 433; Mar. 3, 1911, c. 231, Sec. 24, 36 Stat. 1091.

Subd. (2). Crimes and offenses. Second. Of all crimes and offenses cognizable under the authority of the United States. (R. S. 563, pars. 1, 2, Sec. 629, pars. 19, 20; Mar. 3, 1875, c. 137, Sec. 1, 18 Stat. 470; Mar. 3, 1887, c. 373, Sec. 1, 24 Stat. 552; Aug. 13, 1888, c. 866, Sec. 1, 25 Stat. 433; Mar. 3, 1911, C. 231, Sec. 24, par. 2, 36 Stat. 1091.

Subd. (12). Suits Concerning Civil Rights. Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 47 of Tit. 8 U.S.C.A. (R. S. 563, par. 11, Sec. 629, par. 17; Mar. 3, 1911, c. 231, Sec. 24, par. 12, 63 Stat. 1092.)

Subd. (14). Suits to redress deprivation of civil rights. Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any state, of any right, privilege or immunity, secured by the Constitution of the United States,

or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or (R. S. 563, par. 12, Sec. 629, par. 16; Mar. 3, 1911, c. 231, Sec. 24, par. 14, 36 Stat. 1092.) Historical Note. This paragraph merges the jurisdiction which had been vested in the District Court by par. 12 of R. S. 563; "The sum or value of the matter in controversy" is immaterial. See last sentence of Subd. (1) of this Section. (41 U.S.C.A. Title 28.)

Subd. (17). Suits by Aliens for Torts. Seventeenth. Of all suits brought by any alien for a tort only, in violation of the laws of Nations or of a treaty of the United States. (R. S. Sec. 563, par. 16; Mar. 3, 1911, c. 231, Sec. 24, par. 17, 36 Stat. 1093.) "The sum or value of the matter in controversy" is immaterial. See last sentence of Subd. (1) of Sec. 41 U.S.C.A. Title 28.

Subd. (23). Suits against trusts, monopolies, and unlawful combinations. Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies. (Mar. 3, 1911, c. 231, Sec. 24, par. 23, 36 Stat. 1093.) Historical Note. "The sum or value of the matter in controversy" is immaterial. See last sentence of subd. (1) of Sec. 41 U.S.C.A. Tit. 8.

"The jurisdiction in civil and criminal matters conferred on the district court by the provisions of Chapter 3 of Title 8, and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; . . .". Section 729 of Title 28, U.S.C.A. (R. S. Sec. 722). See also pp. 8-9 of the first printed part of the Motion to Strike and Opposing Affidavit thereto. The section is there set forth in full.

No. 133

JUN 22 1945

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

WASHINGTON, D. C.

October Term, 1945.

NICHOLAS J. CURTIS,
Petitioner,

vs.

UTAH FUEL COMPANY, ET ALS.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS THIRD CIRCUIT.

MOTION TO TOLERATE THE LENGTH OF THE PETITION AND APPENDIX.

NICHOLAS J. CURTIS, LL. B.,
Petitioner Appearing in Person,
No. 145 North Broad Street,
Trenton 8, New Jersey.

TO THE RESPONDENTS AND THEIR ATTORNEYS OF RECORD.

I. F. Huntzinger Co., *Appellate Printers*, Camden, N. J.

IN THE

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

NICHOLAS J. CURTIS, *Petitioner,* vs. UTAH FUEL COMPANY, ET ALS., *Respondents.*	October Term, 1945. On Petition for Writ of Certiorari to the C. C. A. 3rd C.

Motion to tolerate the length of the petition and Appendix.

NICHOLAS J. CURTIS, LL. B.,
Petitioner,
No. 145 N. Broad Street,
Trenton 8, New Jersey.

Now this day comes the petitioner, Nicholas J. Curtis, and moves the Honorable Supreme Court of the United States to tolerate the length of the Petition and Appendix thereto in this said proceeding for Writ of Certiorari.

The reasons for moving this honorable court to tolerate the length of the Petition and Appendix are the following:

1. The cause concerns the petitioner himself to whom a gross injustice has been and is done, and is threatened to be continued.

2. The Petition and Appendix present an infernal conspiracy which originated away back in the years 1909-10 and to this day continues just, and more so, as it was in those days when it was formed.

3. The authorities of the State of Utah are not and never were justified in persecuting and prosecuting the petitioner herein; nor they ever were justified in moving other persons to aid and assist them; and now, as well as during the life and existence of the conspiracy, they are unfair in their practice in participating and carrying on the conspiracy, because they have not and never have had any cause or reason to institute, or to move other innocent persons to institute, criminal proceedings against this petitioner, because he never did do any harm to any one in their State and always demeaned himself according to laws of their said State. They are unfair, because they have under their control the records of the criminal institution at Provo, Utah, and the Superintendent and his Assistants and all other persons who participated in the conspiracy and refuse to divulge the truth to the Courts; but to the contrary proceeded and do proceed upon the corruptive practices of the Utah Fuel Company and its lawyers.

4. The proceeding has to be long because the conspiracy has reached a climax beyond control and it is carried on by the largest communication System in the world, The American Telephone & Telegraph Company and Associated Companies.

5. Because the petitioner herein is far from being in need for a day's work to live on because through inheritance from his father and mother and acquisitions by purchase, "by right", he owns a modest part in a modest estate or estates from which many other persons are making their

living; and therefore he is far from being a dependent upon the will and malice of Judge Guy L. Fake of the District Court of the United States for the District of New Jersey for his life, liberty and property and the pursuance of his happiness; but the American Telephone & Telegraph Company and Associated Companies carry on a gigantic system of peonage (Title 8 U.S.C.A. Sections 49, 56; Title 18 U.S.C.A. Sections 444, 445, 555) in general (see the Exhibits and the cases cited in pages 281-284 Record) and no conspiracy is too small and none too large for them to carry it out; and it does, or they are doing it under fictitious names and to this end every person and all means available are used in the execution of the conspiracy presented to this Court, and therefore the petition and appendix had to be supported by authoritative cases and authorities in order to obtain its objective.

Whereof nothing is or can or will be taken away unjustly from any one of the parties respondents here and defendants below, except according to right and justice and the laws of the United States with a free hand and free right to give evidence for which the petitioner is ready to advance the costs of taking the same.

Respectfully submitted,

NICHOLAS J. CURTIS, LL. B.,
Petitioner Appearing Pro Se,
No. 145 North Broad Street,
Trenton 8, New Jersey.

To the Respondents and Their
Attorneys of Record.

(6)

FILED
JUL 9 1945
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 133

NICHOLAS J. CURTIS,

Petitioner,

vs.

UTAH FUEL COMPANY, a corporation, et al.,

Respondents.

BRIEF OF RESPONDENTS, UTAH FUEL COMPANY, ET AL., IN OPPOSITION TO PETITION OF NICHOLAS J. CURTIS FOR WRIT OF CERTIORARI

H. BRUA CAMPBELL,
40 Wall Street,
New York, N. Y.

H. COLLIN MINTON, JR.,
28 West State Street,
Trenton, N. J.

Counsel for Utah Fuel Company, et al.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

NICHOLAS J. CURTIS,

Petitioner,

vs.

UTAH FUEL COMPANY, a corporation, et al.,

Respondents.

BRIEF OF RESPONDENTS, UTAH FUEL COMPANY, ET AL., IN OPPOSITION TO PETITION OF NICHOLAS J. CURTIS FOR WRIT OF CERTIORARI

An examination of the Brief of Petitioner and of the Petition bears out the opinion of Judge Fake in the District Court (p. 308-a, record) that the pleading "is so involved, disconnected and incoherent as to be totally defective."

This defendant had filed an answer to the Bill of Complaint (p. 315-a, record), and was about to move for judgment on the pleadings when this appeal was filed.

Respectfully,

H. COLLIN MINTON, JR.,
H. BRUA CAMPBELL,
Attys. for Defendant-Appellees, Utah Fuel Company, et al.

Dated:
June 26, 1945.

No. 133

(7)

JUN 22 1945

CHARLES ELMORE CROPL
CLER

IN THE

Supreme Court of the United States

WASHINGTON, D. C.

OCTOBER TERM, 1945.

NICHOLAS J. CURTIS, Petitioner,

vs.

UTAH FUEL COMPANY, et als., Respondents.

ON PETITION FOR WRIT OF CERTIORARI.

MOTION NO. 1. MOTION FOR LEAVE TO FILE TWELVE COPIES OF THE BRIEF FILED IN THE CIRCUIT COURT OF APPEALS THIRD CIRCUIT.

MOTION NO. 2. MOTION FOR LEAVE TO FILE PHOTOSTATED EXHIBITS OBTAINED FROM THE BELL LABORATORIES RECORD IN SUPPORT OF THE CONTENTIONS MADE IN PLEADINGS IN THE RECORD AND IN THE SAID BRIEF.

NICHOLAS J. CURTIS, LL.B., Petitioner,
No. 145 N. Broad Street,
Trenton 8, N. J.

TO:

H. COLLIN MINTON, JR.,
Trenton Trust Bldg., Trenton, N. J.,
Attorney pro se, Utah Fuel Co., et als.

WILLIAM V. ROSENKRANS,
ROSENKRANS & ROSENKRANS,
Attorneys pro se and others, American Telephone & Telegraph Company.

CAROL C. JOHNSON,
No. 68 William St., New York City, N. Y.,
Attorney pro se.

GEO. A. CELLA,
Broad Street Bank Bldg., Trenton, N. J.,
Attorney for Geo. Lavdas and Louis Antonopoulos.

CONSTANTINE DONATO,
Trenton, N. J.,
Attorney for James Millas and Savoy Restaurant.

I. F. Huntzinger Co., *Appellate Printers*, Camden, N. J.

IN THE

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

NICHOLAS J. CURTIS,
Petitioner,
vs.
UTAH FUEL COMPANY, ET ALS.,
Respondents.

October Term, 1945.
On Petition for Writ of Certiorari.

MOTION NO. 1. Motion for leave to file 12 copies of the Brief filed in the Circuit Court of Appeals, Third Circuit.

And:

MOTION NO. 2. Motion for leave to file photostated exhibits obtained from the Bell Laboratories record in support of the contentions made in pleadings in the record and in the said Brief.

NICHOLAS J. CURTIS, LL. B.,
Petitioner,
No. 145 N. Broad Street,
Trenton 8, N. J.

MOTION NO. 1.

Now this day comes the petitioner and moves the court that he be granted leave under Supreme Court Rules 15 and 18; the authority of Sec. 6236 Hughe's Fed. Practice and the cases cited therein; and the authority found in the case of Shina v. Brown, 318 U. S. 787, 87 L. Ed., 63 Sup.

Ct. 982, to file twelve (12) copies of the Brief which he filed in the Circuit Court of Appeals Third Circuit to be considered by this Court as a part of the Appendix to the Petitioner's Petition, Brief and Appendix for Writ of Certiorari to be issued to the said C. C. A. 3rd C.

The reason for moving this Court to consider said Brief as a part of the present proceedings is that the petitioner herein presented the issues formed in the cases now before this Court by the repeated overt acts of the defendants in unity; and that the said Circuit Court refused to apply and construe the rule of equal rights under the laws in the cases now before this Court (8 U. S. C. A. Sec. 41). These said copies of said Brief are mere exhibits, useful to show the contentions made in the lower court (Hughe's Fed. Pr. Sec. 6236).

MOTION NO. 2.

The petitioner herein also and or, likewise, moves this Court to grant him leave to file the Photostated Exhibits the contents of which to be taken in consideration by this Court in support of the charges he makes against the American Telephone & Telegraph Company and its System. These said Exhibits are also mere exhibits useful to show the contentions made against said Telephone Company as co-carrier-operator of the conspiracy which is set forth in the two complaints and pleadings and Exhibits thereto. The said conspiracy is now in its highest attainment and by reference the facts set forth in the Affidavit which is set forth on pages 336-340 Record are repeated here.

Respectfully submitted,

NICHOLAS J. CURTIS, LL. B.,
Petitioner,
No. 145 N. Broad Street,
Trenton 8, N. J.

BELL LABORATORIES RECORD.

TRENTON CITY LIBRARY.

1. Vol's 1-2, pages 200-201-202-203-204.
2. Vol's 3-4, pages 126-127-128; 305-306; 307-308-309-310-311-312; 314-315-316-317; 318-319-320-321-322-323-324; 326-327-328.
3. Vol's 5-6, pages 112-113-114-115-116; 402; 215.
4. Vol. 7 (VII) pages 276-277-278; 64.
5. Vol. 8 (VIII) pages 28, 230-31; 257-258-259-260-261-262; 356-357-358-359-360-361-362; 398; 399-400-401-402-403-404; 531-532-533-534.
6. Vol. 9 (IX) pages 80-81-82-83-84; 262-263-264; 358-359-360-361-362; 378-379-380-381-382.
7. Vol. 13, pages 171-172-173.
8. Vol. 14, pages 400-401-402-403-404-405.
9. Vol. 15, pages 25-26-27-28-29.
10. Vol. 16, pages 108-109-110-111-112-113.
11. Vol. 17, page 313.
12. Vol. 18, pages 34-35-36-37.
13. Vol. 19, pages 298-299-300.

Volume 10, pages 144-145-146-147-148-149; 58-59-60-61.

Volume 15, pages 7-8-9-10.

TO PHOTOSTATER: Each page is to be and make up one single page. The material photostated has to be in the proper form in order that the whole matter or all the pages should make up a modest volume. This said volume is to be submitted to the United States Supreme Court by Motion and should be photostated in a proper and modest form as according to the dignity of that Court.

NICHOLAS J. CURTIS,
No. 145 North Broad Street,
Trenton 8, New Jersey.

AUG 17 1945
CHARLES ELMORE CROPLEY
CLERK

No. 133

IN THE

Supreme Court of the United States

IN THE MATTER OF NICHOLAS J. CURTIS
Petitioner,

vs.

UTAH FUEL COMPANY, ET AL.
Respondents.

Docketed Under No. 1382

ON PETITION FOR WRIT OF CERTIORARI

REPLY BRIEF DIRECTED AGAINST THE BRIEF FILED BY THE ABOVE NAMED RESPONDENTS, UTAH FUEL COMPANY ET AL.

NICHOLAS J. CURTIS LL. B.,
Petitioner Appearing Pro Se,
No. 145 N. Broad Street,
Trenton, 8, New Jersey.

To:
H. COLLIN MINTON, JR.,
Counsel of Record
And To His Co-Counsels,
Trenton Trust Bldg.,
Trenton, New Jersey.

TABLE OF CONTENTS

CITATIONS

REPLY BRIEF DIRECTED AGAINST THE SO-CALLED BRIEF FILED BY RESPONDENTS UTAH FUEL COMPANY, ET AL.

Petitioner respectfully requests this Honorable Court to refuse to consider the so-called brief of respondents, Utah Fuel Company, et al. in opposition to petition of Nicholas J. Curtis for writ of certiorari, brief dated June 26, 1945, filed in this cause, upon the following grounds:

1. The said brief so filed is not anywhere near of like character with the brief required of the petitioner; and the brief filed in the Circuit Court of Appeals, Third Circuit, on appeal No. 8664, copies of which have been filed with the Clerk of this Court and motion made to the Court and copy served upon the respondents for the Court to consider the same.

2. The said respondents failed to traverse any of the facts stated by the petitioner in his Record, Petition, Brief, Appendix, and Exhibits, and therefore the statements so made should be taken as true.

3. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes, Federal Rule 10, (c) of the Federal Rules of Civil Procedure for the District Courts of the United States following section 723c of Title 28, U. S. C. A.

b. Under the authority of the said provisions of said clause as found in said paragraph of said rule the Memorandum Opinion of Judge Thomas G. Walker as it is set

forth on pages 17-22 of the Bill on the Equity side of the District Court, is a part and particle of the Bill on the equity side of said court. To the same effect and with like force with the quotations made in paragraphs 21-22-23 on pages 24-27-30 of the said Bill in Equity. On this question petitioner relies upon the following quotations of authorities and statutes:

> *Hughes Federal Practice*, Sec. 20201, p. 419. Fed. Rule 10, c.

Likewise the practice of incorporating exhibits attached to a pleading into the pleading and making it a part thereof has long been followed in equity causes in the federal courts. 5. (*Marshal v. Turnball*, 34 F. 827; *Surget v. Byers*, Fed. Cas. No. 13,629, Hempst. 715, 15 L. Ed. 670) and is usually permitted in Code Jurisdictions. 6. *Stephens v. American Fire Ins. Co.*, 14 Utah 265, 47 P. 83; *Hudson v. Scottish Union & Nat. Ins. Co.*, 110 Ky. 722, 62 N. W. 513; *American Freehold Land Mortgage Co. v. McManus*, 68 Ark. 263, 58 S. W. 250, in equitable actions. See also: *Peoples Natural Gas Co. v. Federal Power Commission*, 127 F. 2d 153, 75 U. S. App. D. C. 235, certiorari denied 316 U. S. 700, 62 S. Ct. 1298, 86 L. Ed. 1769; *Andrews v. Equitable Life Assur. Soc. of U. S.*, 124 F. 2d 788, certiorari denied, 316 U. S. 682, 62 S. Ct. 1270, 86 L. Ed. 1755; and also: *Moores Fed. Pr.* page 612 and cases cited and its pocket part, same page and cases cited; also *Story's Equity Pleading*, 10th Edition. Ch. XX, page 746 et seq. Sec's. 884, 885, 889, 890, 891.

4. The said respondents in their said so-called brief call the Honorable Court's attention to the Opinion of Dis-

trict Judge Guy L. Fake but failed to traverse the facts stated in reasons X, Y, Z on pages 80-to first part of page 85 of the sworn petition for certiorari: Q. Inv. 7 on page 128 of brief in support of said petition; paragraph 10 of Ch. D., pages 19-26, Petition; and paragraph 13 of Ch. D. on page 27 of Petition for writ of certiorari; and paragraph 4, pages 8 to top of page 11, of the brief to the Circuit Court of Appeals, Third Circuit. To the same effect in the brief they filed on the appeal to the said C. C. A. 3rd C. 8664.

b. The first undersigned counsel in said brief is the same person who staged the mob in the district court and offered to pay to Judge Fake the full amount involved if he would destroy the petitioner herein. The Opinion in question is tainted with duress and fraud.

c. Fraud is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to gain an advantage over another by false suggestions or by suppression of the truth (Citations): 37 C. J. S. Sec. 1 at page 204.

d. Fraud has also been defined as any cunning, deception, or artifice used to circumvent, cheat, or deceive another: 37 C. J. S. Sec. 1 at page 205. Citing Note 9 under which numerous cases are cited.

e. Duress is by some authorities classified as a species of fraud: 37 C. J. S. Sec. 1, at page 207. Citing Note 32 under which there are cited numerous cases.

f. Duress is gross species of fraud: *Coughlin v. City of Milwaukee*, 279 N. W. 62, 227 Wis. 357, 119 A. L. R. 990.

g. Bouviers Legal Dictionary defines Duress (at page 959) as "Personal restraint, or fear of personal injury or imprisonment." Citing: *Hazelring v. Donaldson*, 2 Metc. (Ky) 445, and cases quoted thereunder.

h. Webster's New International Dictionary, 2d Ed., defines Duress as: "1. Hardness; harshness; cruelty; affliction. 2. Imprisonment; also constraint; pressure; compulsion. 3. Compulsion or restraint by which a person is illegally forced to do or forbear some act."

i. Only a revolutionary chieftain will resort to those means to which District Judge Guy L. Fake and H. Collin Minton, Jr. resorted to destroy their adversary.

5. The Equity suit (Civil No. 2800) in the district court was allocated to come up for hearing before a Court of three judges. Notice to that effect was given by the Clerk to the plaintiff below advising him to prepare and submit pleading for three judges; and thereupon plaintiff below and petitioner here acted accordingly by preparing and filing with the Clerk additional pleadings or copies of the original on file, together with copies of briefs for each one of the would be three judges. Notwithstanding these said facts, District Judge Guy L. Fake took the law into his own hands and proceeded all by himself and his companion in conspiracy, H. Collin Minton, Jr., and thus acting alone, District Judge Guy L. Fake had no power or authority to dismiss the suit and falsify its record.

The procedure in such cases is prescribed and governed by the Act of Congress of April 6, 1942, Ch. 210, Sec. 3, 56 Stat. 199, to wit: United States Code. Supp. IV. 1941-1945. Title 28 (Judicial Code and Judiciary) Sec. 729.

Three Judge District Court Action for Interlocutory Injunction and Final Hearing; Powers of a Single Judge.

> "In any action in a district court wherein the action of three judges is required for the hearing and determination of an application for interlocutory injunction and for the final hearing by reason of the provisions of section 47, 380, or 380a of this title, or section 18 of Title 15 and section 44 of title 49, as amended by section 1 of the Act of April 6, 1942, chapter 210, any one of such three judges may perform all functions, conduct all proceedings, except the trial of such action, and enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not * * * dismiss the action, or enter a summary or final judgment on all or any part of the action." (April 6, 1942, Ch. 210, Sec. 3, 56 Stat. 199.

It follows that District Judge Guy L. Fake dismissed the equity suit without judicial authority to do so and therefore his Opinion in the case is null and void.

6. The respondents in their said brief quote the defects which District Judge Guy L. Fake set forth in his opinion as being present in the bill in equity or, on the equity side of the court, but they do not say a word traversing, to-wit:

a. "We will see what we can do." Fake, D. J. to H. Collin Minton, Jr., counsel pro se, Utah Fuel Company, et al. in answer to his offers to pay to said judge the full amount involved.

b. "All these is illegal, watch the lawyers; watch Wienberger, he might take the case." Fake, D. J. to said Counsel.

c. The defects, if any, do not justify the court to dismiss the suit, for the following reasons:

1. Title 28 U. S. C. A. Sec. 777. Defects of form; Amendments.

No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form; * * * and such court shall amend every such defect and want of form * * *; and may at any time permit either of the parties to amend. (R. S. Sec. 954.)

Montgomery's Manual of Federal Jurisdiction and Procedure, 4th Edition, 1942, Sec. 184. Amended and Supplemental Pleadings—Rule 15.—Rule 15 of the Rules of Civil Procedure deals with the amended and supplemental Pleadings.

The purpose of the rule is to assure the determination of controversies in view of their merits, and not with respect to procedural niceties. 14-18. *Overfield v. Pennroad Corporation*, (D., Pa. 1941.) 39 F. Supp. 482. * * * (3) The rules of civil procedure expressly indicate that where leave of Court is required for an amendment, such "leave shall be freely given when justice so requires". Rule 15 (a), 28 U. S. C. A. following Sec. 723c, in the interest of assuring

the determination of controversies upon the merits and not upon procedural niceties * * * (11) * * * In the interest of the expeditious and equitable disposition of causes, amendments which tend to prevent a failure of justice should be liberally allowed. * * * See also *Hughes Fed. Pr.*

Rule 15. Amended and Supplemental Pleadings. Section 20851, holding: The rule is patterned upon former Equity Rules 19, 28, 32, 34, and 35. Thus the plaintiff may amend his complaint as of right without leave at any time before the answer is served. 5. H. F. Pr. Sec. 20862, p. 511. *Bugeln and Smith v. Standard Brands,* 27 F. Supp. 399; "shall be freely given when justice so requires". H. F. Pr. Sec. 20863, p. 512; Under Rule 15 (a) amendments are to be liberally allowed. The new rules contemplating decisions of controversies on the merits rather than dismissal thereof on technicalities; and state practice restricting amendments is no longer binding on the Federal Courts. 12. *Moore v. Illinois Cent. R. Co.,* 24 F. Supp. 731; *Downey v. Palmer,* 27 F. Supp. 993 (at page 513.)

Like under the equity practice as above indicated, so also under Rule 15 (a) leave to amend follows as a general rule, as a matter of course, on dismissal on motion, especially in view of the specific mandate "leave shall be freely given when justice so requires." 13. *Earhard v. Valerius,* 25 F. Supp. 754.

7. The said respondents point out or, are calling the Honorable Court's attention to, the answer which they corruptively filed but failed to traverse the facts set forth in Reasons P. Q. R., pages 54-57 of the petition.

8. Where (as in the present case) the bill set forth matter calling for equitable relief, no matter what its de-

ficiencies of form, the plaintiff can not be required to amend in view of Rule 18 (Equity Rule 18) *Williams v. Pope*, 215 Fed. Rep. 1000.

Wherefore, the petitioner, Nicholas J. Curtis, urges this Honorable Court:

1. To refuse to consider the respondents' brief referred to above to which this reply brief is directed;

2. To grant the Writ of Certiorari in the case;

3. To try the cause now before it and formulate a just and legal decision to guide the court below in the final proceedings to be there taken in conformity with the decision of this Court; and

4. To make such provisions in its decision disqualifying District Judge Guy L. Fake from proceeding, in any way, any further in the above captioned cause or causes.

Very respectfully submitted,
NICHOLAS J. CURTIS LL. B.,
Petitioner Appearing in Person,
No. 145 North Broad Street,
Trenton, 8, New Jersey.

Dated this 13th day of
July, A. D., 1945.

To: H. COLLIN MINTON, JR.,
and his co-counsel,
Trenton Trust Bldg.,
Trenton, New Jersey.